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Francis THE *Hargrave*
PRACTICE
OF THE
SPIRITUAL
OR
Ecclesiastical Courts.

To which is added,
A Brief DISCOURSE
OF THE
STRUCTURE and MANNER
Of Forming the
LIBEL or DECLARATION.

The Third Edition, Corrected; with large Additions.

By *H. Consett* K

Παδίως οἱ φαῦλοι κακότητι αἰονῶσι τὰς περὶ αὐτοὺς.

L O N D O N,

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Venerabilibus & Egregiis viris Domino Thomæ Exton,
Equiti Aurato, Magistro Aulæ Trinitatis Cantabri-
giæ, Johanni Boord, J. C^o. L. L. Professori in
eadem Aulâ. Sociis insuper inclytis, Adolescentibus-
que ejusdem Aulæ salutem, gratiam benedictionemque
omnimodam ut plurimum exopto.

Quid de meâ (Domini tam insignes) tantâ
loqui audaciâ molirer: Qui vestra nimi-
rum nomina, ubique tamen celeberrima,
paginis hisce, perperam omnino scriptis
prætendere ausus fui? Vosmet revera, instar Asyli
(cui est mihi fugiendum) ante me posuisse planè
confiteor. Candori profectò, benignitatique vô-
strum, Anchoram certò figens; obsequii, erga Ado-
lescentes à me obnixè optati, scintillam largiri ag-
gressus sum: Ut Curiarum nempè Ecclesiasticarum
~~negis~~, ex meis licet conaminibus, admodum lan-
guidis, in methodum tam accuratam redigeretur,
dummodo tam in Praxi, quàm in Jure, (prout res
nata fuerit) confestim eruditi, imbutique esse queant.
Hoc ceopusculum, non esse non existens Domino
Clarke, apprimè deberi fatetur: Methodicè astverò
existente, aliis haud parùm authoribus semet (ut
opinor) astrictos, Adolescentes haud denegabunt:
Aliquorum nomina, Libri sequentis marginimemet
adjunxisse pateat. De Libro namque isthoc Domi-
ni Clarke, inscripto [*Francisci Clarke Praxis Curia-
rum Ecclesiasticarum*] hocce (semotâ invidiâ, detra-
ctioneque omnimodâ abjurata) sum dicere coactus,
Methodum ejus perperam omninò, crudamque exi-
stere; Adolescentesvè in praxi, absque bene erudi-
torum adminiculo interveniente pariter & incul-
cante, nullatenus instruere capacem.

Epistola Dedicatoria.

Operi astverò huic suscepto, ab aliâ etiam causâ memet astringi agnosco: Societati nimirum vestræ tam insigni ut litarer; vestrasque insuper verbis, exaggerarem laudes. Alumnum sicuti à vobis, memet vocare non est permissum; ab radiis tamen à vobis profluentibus, totumque terrarum Orbem illuminantibus (mediante nempè consilio *Clar. Domini Barloæ Wickham* è vestrà ex nupero Societate, cujus honorificè sum recordatus) scientiam isthanc licet minimam, in jure civili mihi acquisitam (intendente memet, prorsusque huic destinato studio) accepisse lubentur agnosco. Heu, heu fortuna tam vaga maximèque ardua! Væ hominum malitiæ, fidelium progeniem, atque Læsæ majestatis Jura vindicantium, hisce conatibus, summèque fractorum, spernentium! Væ invidiæ, sævitæque novercæ, ita immense iniquæ! De esse meo fermè spoliavère: In me miserias, protrusère, ut conamina, consiliaque mea aboriuntur. De hisce loqui ecquid ultra statuerò? Ultra patrocinium, à vobis mihi donari imploratum, nihil certè omnino: Ut opus insuper hoccine à me susceptum pergratum vobis videatur: Effectum (sicuti in votis semper habeo positum meis) suum sortiatur debitum, nusquam vovere omittendum est mihi,

Vobis (Præclari) Humiliter Addictissimo,

Henrico Consetio.

Eboraci Dat. Calend.

Martii, Anno Salutis

M.DC.LXXXI.

THE EPISTLE TO THE READER.

*I*t is not unknown to any, who pretend to the least of either Learning or History, that the Civil Law (though so contemptible in this our Nation) is a Study of as great Learning and Reason, as any Law the World: No Nation where it is profess'd, ever yet complaining of its Deficiency in any Thing might render Compleat and Perfect, so as to administer Justice to every one in their Station.

Nor have the Professors thereof been less in Esteem, or less Eminent, than the Professors of our Common Law here in England at this Day; being always notified and distinguished from other Professions, by the gravest and most respectful Titles; [as Juris-P.udentes, Juris-consulti, &c.] Nor have they ever wanted the Benevolent Aspect of those Emperors and Princes, under whom they exercised this Function, employing them in their Ambassies and Councils; by Reason whereof they have received great Bounties, and have had Honours conferred on them for their Service in that Capacity. One Instance we have of the Emperor Charles the Fourth, who conferred upon Bartholus (a Learned Civilian, and one of his Council) a Coat Armour, as a Reward of his ingenious Counsels and Memorable Service.

And truly I see no Cause why we should have less, but rather greater Esteem for all such wholesome Laws, as
curb

The Epistle to the Reader.

curb and limit the Exorbitances of Licentious Men; at such a Time, when the just Vengeance is ready to overtake us. For what Idiot discerns not the manifold and deformed Confusion of Opinions, Worships and Manners, have corrupted Things both publick and private? Daily and almost Tragical Examples, obvious to all, do demonstrate to us how Licentious Men are grown; how they make themselves drunk with Wickedness; how they endeavour to eclipse the Lustre of our Common-weal; how they strive to bring a Plague upon our Church, and Danger to all.

Flectere si nequeunt Superos, Acheronta movebunt.

That our Ecclesiastical Laws professed in this Land have lain, and at this Instant do lie, under most unjust and severe Imputations, I am very sensible. And being desirous to convince the Vulgar, that they are unjust, I have reduced the following Discourse into English, and that in so full and plain a Method, as the weakest Capacity may be satisfied, and inform it self as to the Justness of Proceedings: And so may be induced to lay aside their common and usual Exclamations against the Church and Government; and rather hate the Manners of such Time-serving Wretches, as stick at no Extortion or Oppression, nay raise their own Fortunes and Estates; not respecting what Injury accreus to the Church or its Government at the same time. But it has been the Misfortune of several Nations and Societies to entertain some one or more, whose indirect Practice was sufficient to bring a Scandal upon the best and purest of Professions and Governments. Which makes Tully renew to the Consideration of the Senators, in his Oration against Catiline, the ancient Provision was made by their Laws, to punish a Pernicious Citizen with more severe Punishments, than an Inveterate Enemy. Yet however, I hope an Amend

The Epistle to the Reader.

made by others employed in these Concerns, whose
Sincerity and Ingenuity sets them above all base and sneak-
ish Acts; so as not to seek Preferments by Injuring
other Men, nor to get Estates by Oppressing the Country,
nor Scandalizing a Government unblamable: Neither
do they need to cover or lessen their own Crimes, by
making every little Miscarriage, or precipitous Act com-
mitted by other Men, appear Black and Odious. Such
as I question not there are, but I fear they are very
rare.

The ensuing Discourse is not set forth either out of
Prejudice or Ostentation, but that the Practice of the
Spiritual Courts may be understood by all People to be
regular and just: Nor is it, I hope, less useful to the
English Tyrones, by being in English, and having not
only the *τὸ ὄν*, but the *τὸ διόν*, not only an Account that
a Thing is, but what and why it is: I hope it will rather
be more useful; the true *ἔννοια* of every Word, as it
is in to be discoursed of, or understood in the Practice,
being also given: Which Cicero, in his Book De Offi-
ciis, accounts a Thing of no small Moment, as he inti-
mises in these Words: (Scil.) Quæ à ratione suscipitur
aliqua re institutio, debet à definitione proficisci,
ut intelligatur quid sit id de quo disputetur.

Some probably will Quarrel that I use Mr. Clarke's
Words, Quid dictum quod non prius? I affirm, 'tis
no Argument of Arrogance in me, nor any Derogation
to his Worth; seeing none but his Words, or the Words
of some of his Contemporaries, could have had such Au-
thority, he having been an ancient Practitioner, and af-
firming many Points of Practice to have been observed
Præxi Perenni for many Years together; and so
consequently allowed of as good Precedents to succeeding
ages. Which Thing being considered, mighty, I hope, take
of the Edge of Detraction. However, to such as are dis-
satisfied

The Epistle to the Reader.

*satisfied with the Work, I shall use the Words of a
mic Poet, in Answer to their Querele.*

Non omnibus unum est,
Quod placet; hic Spinās colligit, ille Rosas.

*Yet far be it from me to be offended at the Errors
Calumnies of Men, seeing many Worthies in all Ages
have fallen under the like Mishap. I shall only soberly
and sincerely affirm, my chief Aim was the Glory of God
and his Church, and the Good of my Country-men.
that my only Hope is, every Detractor will in time
ashamed of his causeless Detraction, when he sees so much
Reproach spread abroad in vain.*

Invidē quid laceras? An effrænata voluptas?
Quid latras? Mordes? Quid tot præstigia canas?
Depone invidiam: Non est tua tuta voluntas
Tu Dominum ultorem, justorum certò videbis.

*Yet at the same time, I acknowledge the Undertaking
is weighty, and the Attempt bold in me: Considering
small Experience I have had in these Concerns, the
my Misfortunes and Discouragements have continually
prevented those Opportunities others have employed,
improving their Knowledge and Faculties: And
considering the Work is to undergo the Censure of so many
Ingenious Criticks, to whom I shall be obliged for the
Candid and Friendly Censure or Reprehension; hoping
they will with Candor amend what's amiss, and be prom-
ted to some new Adventure, on this Account, may render
them more Serviceable to their Country-men. At least
do not doubt, but this will find a Friendly and Candid
Acceptance among such as are Unprejudiced, and who
affable and meek Tempers will rather prompt them
amend an Error committed, than Calumniate.*

THE PRACTICE

OF THE Ecclesiastical Courts.

The FIRST PART.

CHAP. I.

SECT. I.

That a Court is, and of the Ecclesiastical Courts, which are celebrated or kept by the Most Reverend the Archbishop of Canterbury.

The Definition of a Court; and what Courts are here treated of.

A Court was formerly called by the Romans, a part of the People; from the Division of Romulus, who first distributed the Roman People into Thirty Parts, that so he might more readily ask the Sentiments or Opinions of every * one, and thereby take care of the Republick. Whence it appears, that the Care which they took in their Political Government, they gave the single Denomination of a Court. Afterwards the same, † in which they managed these publick Cares or Con-

* ff. de orig. Jur. l. 2. Sect. 2.

† Petrus Pontifex de Jur. municip. n. 21.

serius, p. 68.

cerns, or the Seat and Temple of the publick Council, obtained the name of Court; which Denomination it has at this day. A Court being defined the Place where Justice is judicially administred. And in the Civil Law it is sometimes call'd by the names of *Curia forum*, as also *Judicium*, though improperly, being no constitutive Part or immediate Cause of that which is properly called *Judicium*, but rather the remote Cause: *Judicium* being defined by *Aristotle*, *νεῖαι τὸ δικαίον καὶ ἀδίκον*, a Judging between the Just and Unjust and is constituted by three Persons, The Plaintiff, (called in the Civil Law *Aktor*) the Defendant (who is also called *Reus*) and the Judge, which three may be said to be the immediate Cause of it.*

* *Aktor* ab agendo, from Acting. *Reus* a Re, from the Thing, *Wesemb. par. ff. de Judiciis, n. 9, 10, 11, 12. Chilianus in pract. c. 22.*

To give an Account of the several Divisions of Courts in the time of the *Romans*, or those at this Day, were far from the Purpose. The Courts here spoken of, are the Spiritual or Ecclesiastical Courts; and those especially which are celebrated, and kept in the Name and by the Authority of the Archbishops of *Canterbury*: Which are,

First, *Alma Curia Cantuariensis de Arcubus London*; which probably receives its Name from the Effects, or by a Metaphor, being the Channel whence Justice flows like a Christalline Stream) is kept within the Parish Church of *St. Mary the Virgin, de Arcubus Civitatis London*, and was anciently called by the Name of the Archbishop's Consistory, as appears by the old Statutes of that Court.

Secondly, The Court of Audience, *S. Curia Audientiae Cantuariensis*, which is kept in the Consistory-place within the Cathedral Church of *St. Paul's, London*.

Thirdly, *Curia Prærogative Cantuariensis*, which is likewise kept in the same Consistory-place.

S E C T. 2.

Of the Days observed in those Courts for Judgment called in the Law *Dies Juridici*.

THE Days, called in the Law *Dies Juridici*, are such as are only proper and suitable, and set apart (in the Law) for Judicial Acts: In which respect they are termed

Oppository

opposites to Holidays; † these being exempt from all Judicial Acts, and rendering them null and void, if attempted to be executed on such Days.

These *Dies Juridici* are reduced to four Terms in the Year; each Term containing sometimes Twelve, Fifteen or twenty Days, sometimes fewer.

The first general Sessions held in the Court of the Arches (for *Michaelmas* Term) was kept for many Years together, the next Day (if no Holiday) after the Feast of St. Faith the Virgin.

Hillary Term begun likewise the next day (if no Holiday) after the Feast of *Hillary* the Bishop.

Easter Term was also kept on Monday fortnight after *Easter-day*, the said Court commonly being *proximo Quinquagesimæ Paschæ*. For Example; In the Year 1680, *Quinden Paschæ* is the First Day of *May* (that being just a Fortnight after *Easter*), and this Term begins the Second of *May* in this Spiritual Court.

Trinity Term was kept in like manner the very next Day (if no Holiday) after the Feast of the Blessed Trinity.

The Court of *Audience* is always wont to be held in the forenoon of the Day next after the Court of the Arches (if no Holiday): And in the Afternoon of the same Day,

The *Prerogative* Court is likewise wont to be kept.

After these Days, there are no certain or determinate Days in which the Law is publickly pleaded: Though frequently after the space of six, seven, eight or more Days after any Court-day (as the Matter requires) they are wont to have Informations (as they call them) for the more easie and speedy Expedition, and terminating of Suits depending in these Courts.

It is also usual for Citations to be issued forth against the Defendant to appear the third, fourth, sixth or other Day next following the Citation, wherein the Judge happens to be judicially to try Causes (no Day of the Month being named) and this is called *Dies incertus*, only in respect of the Time when he must appear; the other Necessaries and Constitutive Parts of the Citation (*Scilicet*) *De quo & an* *cui extiturus sit*, being compleat. In which case, it is necessary that the Defendant repair immediately to the Place

† *Wesemb. ff. T. d. feriis. l. 1. & l. omnes in fin.*

Fascn. in. l. 4. n.

3. *hoc tit. Spec. d. fer. Scet fin.*

* It is so in the Courts of the Archbishop of York,

Court of Arches.

Court of Audience.

Prerogative Court.

where the Court is to be kept, and inform himself certainly what Day of the Week or Month is the Day intended for his Appearance, lest his Adversary get Advantage by his not appearing.

CHAP. II.

Of the Original of the Court of Arches, the Court of Audience, with their Styles, and the Causes generally tryed in them; also the Jurisdiction of those Two Courts jointly.

SECT. I.

Of the Court of Arches.

1. *Its Original, and why its Official is called Dean of the Arches.*
2. *Its Style; how defined in general.*
3. *The Causes usually tryed in it.*

1. **T**HE Original of the Court of Arches is uncertain; but it is evident that such a Court, as is here spoke of, has been of old: For *Alexander the Third*, being Bishop of *Rome* in the Reign of *Henry the Second*, did (by his Writing or Edict to the Dean of the Arches, and *Robert Kilwork* Archbishop of *Canterbury*, who held the Seat *Anno 1272.*) abrogate and abolish all the antient and obsolete Laws of that Court, and set up others in their stead.

The Official of this Court is at this Day (as he has been wont so to be) called *Dean of the Arches*, being for the most part imployed in this Kingdom (as well as in Parts beyond the Seas) in the King's Affairs, and therefore seldom resident within the City of *London*.

But he being absent, the Dean of the Deanary of the Arches (whose Jurisdiction is terminated by the Limits or Bounds of Thirteen Parishes in *London*, which are belong-

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g to the Ecclesiastical Jurisdiction of the Archbishops (Canterbury) is often substituted, as the Surrogate of that Official (and that by Prescript of the ancient Statutes of the said Court) in which State he hears and determines Causes as Official: Whence, by vulgar Error, he (as also the Official himself, whilst at leisure to dispatch Business) is called the Dean of the Arches. The said Official is likewise called Official of the Consistory of the Archbishop, else barely Official without other Addition, as appears by the said Statutes: Somerimes the Archbishop of Canterbury has had no other Official at the same time besides him.

2. The next Thing considerable is the Style of the Court. This Word [Style] is confusedly taken in the Law; sometimes for the word *Consuetudo*; (which takes likewise the name of *Stylus Curiae*, *Stylus Judicii*, &c.) How these Words, *Consuetudo* & *Observatio*, do differ, is too tedious now though formerly they were indifferently used one for another. It is defined at this Day a particular Custom, only powerful and of force in that Court where 'tis in use: in which respect, it differs from a Custom, which may possibly be so general, as to be of force in the several Divisions of Courts. The Style of this Court is usually entred in Words to this Effect: (*Scil.*)

Daniel Dun Knight, Doctor of Laws, principal Official * of the beautiful Court of Canterbury, in the Arches, London.

3. As to the Causes tryable in this Court; its Official is the proper and competent Judge to take Cognizance of all Ecclesiastical Causes whatsoever †, not only at the Instance of Parties, but also of his meer Office, or when 'tis promoted; as also all manner of Appeals whatsoever from any Bishops, Deans and Chapters of Cathedral or Collegiate Churches; Archdeacons, their Officials and Commissaries, or other Ecclesiastical Judges whatsoever, (except some certain peculiar Jurisdictions within the Province of Canterbury, which belong to the King's Majesty) having exercising any Ecclesiastical Jurisdiction or Authority. Also all Commissaries of the Archbishop of Canterbury whatsoever, particular or special, within all or any Diocese of

* *Officialis*
quid sit ejus officium Lind. de
Sequest. c. 1. frequens verb. Officiales.

† Lind. de *Judiciis. c. 1. verb. Commitatur.*
Decan. de Arcubus ex sola consuetud. absque Commissione Archiepiscopi, non potest cognoscere in Causis Matrimonialibus, & an Commissio debet esse generalis vel specialis.

his Province; to wit, from the Commissaries of the Archbishop which are constituted within the City and Diocese of *Canterbury*. Also of all Complaints whatsoever against any of the aforesaid Judges (except as before excepted) for denying or delaying of Justice to be administered. The Official of the Court of Arches may also proceed in all Causes whatsoever relating to Benefices, either by way of Contest betwixt Parties, or by way of single or double Complaint, and may institute or suspend.

S E C T. 2.

Of the Court of Audience.

1. *Its Original.*
2. *Its Style.*
3. *The Causes usually tryed in it.*

1. **T**HE Original of the Court of Audience seems to be from this; (*Scil.*) The Archbishops themselves were wont to try and determin very many Causes at their own Palaces; but before they pronounced their definitive Sentence, they committed the Matter to be discussed and argued by several Men Skilled and Learned in the Law, whom they named their Auditors: So that for the-executing this Power (formerly Domestick) there were Auditors of the Archbishop's Court, (and of the Causes therein) appointed every where. To the Auditors, there was likewise joined a Chancellor of the Archbishop, who executed Causes of their mere Office only, and no other.

2. The Style of this Court is in the Name and Style of the most Reverend the Archbishop; and all Persons summoned to appear, are summoned in his Name to appear before his Auditor of Causes for his Court of Audience.

3. The Auditor of the Court of Audience of *Canterbury*, hath in all Things the same Jurisdiction with the said Official of the Arches; and has antiently been (as at present he is) by vertue of a special Commission, * *Vicar General* of the said Archbishop of *Canterbury* in Things Spiritual;

* *Vicarius Generalis & Officialis quomodo differunt Lind. de sequest. pos. c. frequens verb. Vicarios & verb. Official. eorum Officia ibi reperias.*

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ual; in which Capacity he executes all and singular Spi-
ritual and Ecclesiastical Jurisdiction of every Diocese be-
coming vacant within the Province of *Canterbury*, which
might otherways appertain to the Bishop thereof, if in be-
ing: and the said Jurisdiction (the Episcopal Seat so be-
coming vacant) he is wont to exercise by himself and his
Commissioners; and also to institute to such Benefices as
are vacant in any Diocese within the Province of *Canterbury*,
the Bishop thereof being so wanting) as well as in the
Diocese of *Canterbury*. Likewise he may by Law and Custom
celebrate the ordinary Visitation within the City and Dio-
cese (where the Episcopal Seat is vacant within the Province
aforesaid) and punish such Offences as are there presented.
This likewise happens equally to both the Judge of the
Court of Audience, and the Official of the Arches, that
as well the one as the other may summon any Inhabitant
within the said Diocese (so vacant as aforesaid) to ap-
pear before him in the Place of Judgment above named,
notwithstanding the Stat. 23 H. 8. c. 9. Seeing that by
the Vacancy of the Episcopal Seat of any Diocese, within
the Province of *Canterbury*, the Archbishop is made the Or-
dinary of the Place, and of the Diocese, during that Va-
cancy; so that he may tolerate his aforesaid Judges,
that they may freely cite all Inhabitants within that Dio-
cese where the Seat is vacant, and compel them to appear
in the said Courts at *London*, notwithstanding the afore-
said Statute.

S E C T. 3.

Of the Jurisdiction of the Judges of the two afore-
said Courts jointly: And what Jurisdiction is.

BEcause, as is aforesaid, one and the same Cause may be
tried in the Court of Arches, and Audience; it is left
to the Election of the Plaintiff to elect in which Court he
will institute or promote his Cause, whether in the Court
of the Arches, or Audience; yet so, as no Man be cited
originally to appear out of the Diocese or peculiar Ju-
risdiction in which he lives, except in the Cases under-

written. (*Scil.*) 1. Except a Suit be commenced for any Excess committed, or any Office neglected or omitted, against Justice and Equity, by any Bishop, Arch-Deacon, Official, or other Person or Judge having any Jurisdiction Ecclesiastical; Or, 2. Except it be proceeded by way of Appeal; Or, 3. Except either of the Parties in Controversie, do think he has any just Cause of *Gravamen*, or Damage offered him by the Ordinary of the Place, his Substitutes or Ministers, after the Suit is commenced before the said Ordinary; Or, 4. Except the Bishop or Judge dares not, or will not proceed against the Party convened before him; Or, 5. Except the Bishop or Ordinary of the Place, where the Cause ought to be instituted, pretend himself interested in the Business directly or indirectly; Or, 6. Except the Bishop, or other inferiour Judge, having Ecclesiastical Jurisdiction in his own Right, or by Commission from some else, do, by his Letters of Requisition or Remission, desire or request the Archbishop, his Official or Auditor aforesaid named, to take to him the said Cause, and duly to examine and determine the same; Or, 7. Except a Suit be commenced in a Cause, for Subtraction of a Legacy, where the Will (by which the Legacy is given) is proved within the Prerogative Court of *Canterbury*, seeing in this Case the Executor, by proving the Will there, has acknowledged the Archbishop his Ordinary, and hath consented to his Jurisdiction; Or, 8. Except the Suit be tryable, as in the Cases mentioned in the ensuing Chapter. In any one of these Cases, the Defendant may be summoned to appear (Originally) out of the Diocese where he lives, notwithstanding the Maxim, *Aktor sequitur forum Rei*, that is, The Plaintiff must institute his Cause in the Court, to whose Jurisdiction the Defendant belongs; for the Words *Forum competentis*, a competent Court, and *Jurisdictionis fundata*, are convertible Terms.

* *Ilal. ad Wesemb. ff. de Jurisdiction. n. 2. Manual. juris a Sebast. Al. mers. in prax. fol. 6. Wesemb. ubi supra de Jurisdictione. n. 3. Et per tot.*

The Word *Jurisdiction**, from the Use of the *Roman Laws*, is variously taken and understood: That here spoke of, seems to be only *Jurisdiction ordinario*, which is a lawful Power (given to him who is appointed Magistrate) to determine Civil and Private Causes; signifying likewise

Forum

forum competentis †, or the proper Court where any ought of right to appear; in which Sense also, we are to understand *iudex ordinarius* to signifie a competent or proper Judge, before whom any ought to be convened.

† *Ordo Camer.*
p. 2. t. 1. Sect. 1.
Jacob Blum.
proc. Cam. t.
27. n. 17.

CHAP. III.

SECT. I.

Of the Prerogative Court of *Canterbury*.

1. *Its Style.*
2. *The Causes tryed therein.*
3. *The Manner of declining the Judge of this Court, and the Manner of alledging his Jurisdiction. **

* This is shewn
afterward in
the 6th Part
of the Book,
chap. 3. num.
15, 16.

THE Style of this Court is likewise wont to be in the Name and Style of the Most Reverend the Archbishops of *Canterbury*; and all Persons summoned to appear, are likewise summoned in his Name to appear before him, or the Keeper, Master or Commissary, of his Prerogative Court of *Canterbury*.

2. To the Judge of the Prerogative Court do belong all Probations, and Approbations of Testaments, the Power of granting Administrations of the Goods of Persons dying (Intestate) within the Province of *Canterbury*; to wit, who have Goods, Rights or Credits, movable or immovable, † out of the Diocese wherein they lived, or inhabited at the time of their Death, of which they were capacitated to dispose, or have disposed: If the said Goods be out of the Diocese extend but to the value * of 5*l.* or upwards, which said Goods are called *bona notabilia*, by the Style and Custom of that Court, which is in force at this Day.

† *De bonis & terris testand.*
vide Swinh. p.
3. Sect. 2, 3, 4.

* *Lind. cap.*
Statutum d. testam. verb. Laicis. Swinh. p.
6. Sect. 11.
n. 5.

In this Court are tryed all Causes of Instance for the proving and revoking of Wills, whether originally (in that instance) exhibited, or formerly proved in Common Form of Law; and for the granting and revoking of Administrations

nistrations in the aforesaid Cases, whether the Judge was privy to the Circumstances at the time of granting the Administration, or whether it were surreptitiously obtained, the Truth being suppress'd, and Falsity suggested by the Party desiring the Administration, contrary to the Law and the Statute; or if it afterwards appear there was a Will proved, or Administration granted by any other Judge, (whereas the same ought to have been done by the Judge of the Prerogative Court) and that it is evident touching their timerary Administring; in these or the like Cases, Causes of Instance may be promoted in the said Court. Also all Causes about giving Accompts: For Example; If any Will be proved in Common Form (which is done by the sole Oath of the Executor) if any Person have an Interest in the Administration or the Deceased's Goods (being perhaps prevented of his Interest by this pretended Will) he may force the Executor to prove the Will by Witnesses, which if the Executor do not sufficiently prove, Sentence is to be given, That the Deceased died Intestate, and that the Probat of that Will, so granted in Common Form of Law, is to be annull'd and revok'd. If any Executor, who is a stranger to the Deceased, (that is) no way related to him, have the greatest Part of the Deceased's Goods bequeathed to him, and is doubtful (the Witnesses to the Will being dead) lest the Children, or next of Kin, or the Widdow of the Deceased, should commence Suit against him for the future, he may by vertue of that Will call the Relict, the Children and next of Kin, of the Deceased in special, (if they think themselves any way* Interessed) and all others whatsoever in general, that pretend to have any Interest in the last Will and Testament of the Deceased, or in the Administration of his Goods, to come and see the Will proved by Witnesses; and lawful Proof being made of this Will, and a definitive Sentence pass'd for the Validity of it, this Will can never be made invalid or voidable hereafter (so as there be no Nullity in the Proceedings) though the Testamentary Witnesses dye in the mean time. And this is frequently practised. But after a Will has been proved in Common Form of Law with-

* Nam sic ci-
sand. non vi-
deris approbare
personas suas.
Cævola caut.
305. Enchir.
Cautel. de. cit.
personali. s. 1.
p. 1.

at being questioned or disproved for the space of thirty Years, then all Benefit of Disproving it is taken away and lost.

But it is to be observed, that when an Executor is called to prove a Will by Witnesses, and does sufficiently prove it if the Plaintiff, who desired to have the Will so proved, makes no Exceptions or Replies (after the Publication of the Witnesses so examined upon the Will) against either the Will or the Witnesses, nor does propound any dilatory Matter to hinder the giving of Sentence for the Validity of the Will, then the Judge cannot condemn the Party (overcome) in Expences: But it is otherways if he does propound dilatory Matters, and fails in the Proof of them, for then he is condemned in Expences of Suit, at least in those that are made since he propounded his contrary Pleas.

Also all Causes in this Court are said to be Summary Causes, because they require a Summary Proceeding.

Lastly, it is to be noted, that if any Will be exhibited at the Petition of any Party desiring to have it revok'd, it is very necessary the Proctor of that Party (instituting the Cause) do immediately accept the Contents of that Will, so far as they make for his Client, lest if any Legacy being given his Client by the Will, he likewise lose that by his general Negation, and disproving the Will. This is a Work of Supererrogation, being spoke of (and more properly, no doubt) in the particular Practice which these Causes require.

S E C T. 2.

The manner of Proving of Wills in this Court in Common Form of Law, &c.

For the manner of proving a will in solemn form, see post 371.

1. What a Will is.
2. What are the Constitutive or Essential Parts of it.
3. What are the Accidental or Formal Parts of it; and how it differs at this Day in England from those Forms observed by Justinian.
4. The Differences of Wills, many sorts of which are abrogated.
5. The

† Swimb.

Part. 6. Sect. 14.

n. 4. Attamen

post testam. &

in forma com-

muni probatum,

&c. Vide ma-

nus. Latch. p.

129. Mynf.

Inst. tit. testa-

tor habens lib.

in potest. in

text. n. 7.

5. The Will, how prov'd in Common Form, and the Executor how sworn.
6. No Executor named in the Will, to whom is the Execution of the Will committed.
7. The Executor being dead, who must prove this Will.

TO this Court likewise belong (as is said) the Proving of Wills, &c.

* Mynf. Inst.
de testament.
ordinandis in
text. testament.
n. 5, 6, 7, 8, 9.
hac per tot hac
omnia reperias.

1. A Will or Testament is defined the absolute * Sentence, Determination, or Decree of our Will, touching that which we intend shall be done after our Death.

2. The Constitutive Parts of this Will are, the Testator, who has Power to make a Will lawfully (intimated by these Words, *our Will*); And the Executor, called in the Civil Law (*Heres*), which is implied in these Words [absolute or just Sentence], for it cannot be said to be perfect, unless an Executor be appointed.

3. The Accidental or Formal Parts of a Will are the Witnesses, or those Circumstances which are used as Attestations to prove the Will just, lawful and right. The Solemnity of which, differs much at this Day (here in *England*) from that formerly practised, and mentioned by *Justinian* and other Civilians, as may appear by *Stat. 30 Car. 2. C.* which will shew the Solemnity so much at large, as it needs not be here inserted.

4. The Differences of Wills are many, as they are enumerated by *Justinian* in his Institutes, the Digests, and the Glosses thereupon; but what Sorts and Forms of Wills are only in force now in *England*, may appear by the abovesaid Statute.

5. At the Time the Executor proves the Will, he brings to the Judge one or more Witnesses, who swear to make a true Answer to such Questions as the Judge demands of them, touching the last Will and Testament of the Deceased. Then the Executor swears in this manner: *You shall swear, That you believe This to be the last Will and Testament of the Deceased, and that you will pay all the Debts and Legacies of the Deceased, so far as the Goods will extend, and Law shall bind you; and that you will cause all the said Goods to be appriz'd, and make a true and perfect Inventory of the said Goods,*

Goods, (at a Day appointed by the Judge, if none be then exhibited) and likewise a true and just Accompt of the said Goods, when you shall be thereto lawfully called. So help you God. They must likewise enter Bond to the Ordinary to this Effect. Upon this, the Judge, either tacitly, or expressly in Words, pronounces the Will valid, and grants the Execution of the same to the Executor.

6. If there is no Executor named in the Will, then the Execution of the Will is committed to the Universal Legatee named in the Will (if there be one) simply as if he were Executor. If there is no such named, then the Administration, with the Will annexed, is granted to the next of Kindred to the Deceased, in like Form as Administrations are granted, if there be no Widow, or that it do not plainly appear to the Judge who the Deceased intended for his Executor.

The Executor dying before he can prove the Will, then the next of Kin to the Executor proves the Will (if the Residue of the Goods were disposed of to the Executor by that Will) with Administration thereto annexed: As suppose a Wife (being Executrix and Universal Legatee, named in her Husband's Will) dye before her proving the Will, (leaving no Children of her Husband the Testator) in this Case, the Ordinary grants the Administration, with the Will annexed, to the nearest of Kindred to the Wife, in manner as follows.

S E C T. 3.

Of Administrations.

1. *How these Words, Administrare and Administrator, are understood.*
2. *What are the Sorts of Administrations here meant of.*
3. *By what Course obtained, and the Oath they take.*

1. **A**dministrare, & negotia * gerere, seem to be Reciprocals, in as much as they predicate *de Procuratore*, or the Manager of Affairs; and an Administrator, in a large Sense, is no other than a Procurator (that is, he) who

* *Manual. Juris a deb. Almerf. verb. Administratio.*

who derives a Power to manage, or carry on Affairs: their Office or Act is called *Administratio*; but these Words more strictly taken (as they are here meant) do signify the Management of the Affairs, of any one deceased, by a special Power derived from the Ordinary of the Place, &c. So that *negotia gerere*, and *negotia agere*, are Opposites, seeing this last predicates only of Judicial Acts.

2. This Power so derived from the Ordinary, are the Letters of Administration, which are either simply such, no Will at all being made, or comparatively such, where a Will being made, but the Executor either not named, or else is dead, as above; in which case the Will is proved as before, and Letters of Administration annexed to the Will with the ordinary Probat (which is the Judges Approbation of the said Will, pronouncing for the Validity thereof) and this is called an Administration, with the Will annex'd.

3. If there is no Widow or Relict of the Deceased (to whom the Administration of the Goods of the Intestate ought to belong of course) then the nearest of Kindred, coming to obtain Letters of Administration, must first have a Citation against all and singular next of Kindred to the Deceased, to come, (at a certain Day, named in the Citation) and appear before the Judge, and shew Cause, if they can, why Administration of the Intestates Goods may not be granted to the Party, at whose Instance the Citation is obtained; and this Citation is to be published in the Parish Church where the Deceased inhabited (whilst he lived) a Sunday or two before the Day of Appearance: if none appear to shew Reasons to the contrary, or that some more of equal Degree or Interest (with the Party who took out the publick Citation) do appear, then the Administration is granted to them equally. If there is a Will, whose Executor is wanting as above, then that Will is proved, and the Administration of the Deceased's Goods annexed. If the Deceased died in Debt, the principal Creditor, or any of the Creditors, may use the like Proceedings. This Practice so long used, (in the Courts of his Grace the Lord Archbishop of York especially) pleads its own Reasons and Necessity, to that no Reasons need be shewn for it. The Oath taken by the Administrator, is to this following effect:

* He is said to die Intestate, who either makes no Will, or makes it not according to Law; or if being made it is again revoked, or else no executor is named in the Will.
Justin. Inst. de hæred. acquir. ab intestat.

* *

Tom

You shall swear, That you believed the Deceased dyed without making any Will, and that you will faithfully Administer all his Goods, &c. and pay all his Debts so far as the Goods will extend, the Law shall bind you; and that you will make a true and perfect Inventory of all and singular the Goods, &c. of the Deceased, and likewise a true and just Accompt of the same, according to the Purport or Intent of the Bond by you to be entred, for due Administring the said Goods, &c. For it's a great Mistake to impose an Oath contrary to the Law; for the Form of the Bond they enter, was appointed to be taken by an Act of Parliament, 23. or 24. year of Car. 2. which limits them their Time, both for an Inventory and Account, &c. So that sooner than that Law limits them, they are not liable to be compelled to give either Inventory or Account, as I suppose. If the Deceased leaves Children in Minority, then the next of Kindred takes the Administration to the use of those Children, and gives good Security to the Court for their Portions.

* De hisce plene
reperias apud
Mynf. Inst. de
hereditat. ab
intestat. ubi
copiose tracta-
tur de Success.

CHAP. IV.

SECT. I.

What manner of Causes may be tryed in the Ecclesiastical Courts.

1. What this Word [Cause] signifies, and what is here meant by it.
2. The Causes whereof this Court takes cognisance.

A Cause (called in the Latin *Causa*) is defined (by Logicians) That, by whose Vertue or Efficacy any Thing is made to have a Being or Existence; but what Analogy or Coherence this may have with that which is here intended, I leave to the more Curious to determine: The word *Cause* is Metaphorically used here for the Word *Action*; which (amongst those many Significations in Glossaries seem to put upon it) we shall only define to be the Right of prosecuting or pursuing (in a Court of Jurisdiction) whatsoever any one supposes is properly his due, &c. Likewise the Division of this Word into Acti-

Causa a casu.
Lind. de Sen-
ten. ex. c. 1. Sect.
Item excommu-
nicamus. verb.
quacunq.

† *Alciat. pr. fol.*
 87, 88. *Seff.*
Causarum divi-
sio Lanf. de pe-
tition. n. 3. de
verb. Sign. a
Seb. Almerf.
verb. Actio.

1.
 Perjury.

* *De hac mate-*
ria plura repe-
rias apud Lanf.
c. quoniam, de
Respons. per tot.
& presertim, n.
12. ad rem fa-
cit. & n. Seff.
 31.

2.
 Simony.

ons mixt, real, personal, &c. were from the Purpose
 be inserted here. †

2. As to the Causes whereof these Courts take Cogni-
 zance, they are these following. 1. If Perjury be commi-
 ted by any Witness or principal Party (*i. e.* the Defendant
 in their Depositions or Answers had or made in any Ec-
 clestialtical Cause, the Party suffering Dammage by the
 Perjury, (or any else, as in a Cause of Correction) may
 promote the Office of the Judge, (for their Soul's Good
 and proceed before the Ecclesiastical Judge against the
 perjured Person, in a Cause of Perjury; or rather may
 cite him to answer certain Articles touching his Soul's
 Health, and especially manifest Perjury committed, (in
 Cause depending before the Ecclesiastical Judge) to be con-
 victed at the Promotion of N. And if the Party concerned
 be convict of Perjury, he is to be Canonically punished
 at the Discretion and Will of the Judge, according to the
 Quality of the Cause. *Lindwood Provincial Constitutions*
pænis. c. Aeternæ Sanctio. verb. perjurio. But it may here
 be inquired, how the Principal Party (who is wont, for the
 most part, to answer as to his Credulity, and not as to the
 absolute Truth of the Matter) can be convict of Perjury.
 I answer, That if the Principal Party (that is, the De-
 fendant) do answer negatively to any Position, which con-
 tains his proper Fact, (and that which he has but lately
 committed too) he ought to be convict, and condemned
 as guilty of Perjury, if the Position deny'd be proved by
 Witnesses: But in this Case, consult the Learned in the Law
 whether the Respondent ought to be convinced of Perjury
 for answering as to his Credulity or Belief, * where the
 Matter being his own proper Fact, is recent, and may be
 presumed to be within the Verge of his Knowledge, and
 fresh in his Memory; And although the Defendants do
 for the most part answer to the Position, containing their
 own proper Fact, (as also to the other Positions which do
 not contain their own proper Fact) I believe, or I do not
 believe, &c. I presume this Error has insinuated it
 through the Ignorance or Negligence of the Register or
 Examiner, who takes the Answer. 2. If a Clergyman have
 committed Simony in obtaining an Ecclesiastical Benefice

may be convened either by the Judge his meer Office,
 at the Instance of a Party, and may be punished accord-
 to the Canonical Sanctions; as also the Lay-persons,
 are Sharers in that Crime. 3. A Usurer likewise (at
 such who lends Money to Use, and receives for the *Usury.*
 directly or indirectly, above the Rate or Quantity of
 Pounds for every Hundred, but not else) may be con-
 vened and punished by the Ecclesiastical Judge. For by the
 Statutes of this Kingdom, it is prohibited the Ecclesiastical
 Judge to proceed against Usury, except the abovesaid Case
 be made sufficiently appear. 4. If any lay violent Hands
 be used against a Clergy-man, or do brawl and quarrel in the Church
 Church-yard; he may be convened and corrected, ei-
 ther by the meer Office of the Judge, or by the Office be-
 voluntarily promoted by the Ecclesiastical Judge, that
 where the Judge assigns any Person to prosecute. 5. If
 any one is accused of Adultery, Whoredom, Drunkenness,
 Schism, or being absent from the Church, or for not
 contributing his Share to the Fabrick of his Parish Church,
 or for the providing Books for the Celebration of Divine
 Service: He may likewise be convened and punished by
 the Ecclesiastical Judge, as above. 6. If any Executor
 in his Hands Legacies left to Pious Uses, the Ecclesia-
 stical Judge may proceed against this Executor of his meer
 Office, or at the Promotion of the Church-Wardens, to
 compel the Executor to the Payment of this Legacy by the Ecclesiastical Cer-
 tification, which signifies the Severity, Vigour, Revenge, Pow-
 er of Sentence, whether of Suspension or Excommunicati-
 on. See *Lindwood, de Testamentis, C. ita quorundam verb.*
Causas. 7. If any is hindred or obstructed (by the
 Slothfulness or Peevishness of some Persons intrusted, or other-
 wise concerned) so that they cannot duly perform the
 Executor's Will according to the Authority granted them,
 or that they cannot possess themselves, or make an Inven-
 tory of the Deceased's Goods, (they probably, or at least
 a Part of them, being in the Hands of some Person
 who hinders them) in this Case the Executor or Adminis-
 trator may implore the Judges Office, and promote it:
 the Judge (the Premises being proved) may pro-
 duce

nounce the Delinquents to have incurr'd the Sentence Excommunication promulged by Law, as in Cases of Temporary Administrators: And in these Cases, the Party guilty is not to be absolved, until he make Satisfaction (to the Church, and likewise to the People) for that Thing which he so incurs the Sentence of Excommunication.

8. 8. If a Rector or Vicar, or any other Person, substract from the Archbishop, Bishop, or Archdeacon, those Procurations that are due to them, by reason of their ordinary Visitation or Synodals; the Party thus grieved, may sue before the Ecclesiastical Judge in a Cause of Substraction, Procurations and Synodals.
9. 9. If any Pension or Yearly Stipend going out of any College, Bishoprick, Cathedral Church, Deanary, or any other Church whatsoever, and ought to be paid to the Rector or Vicar of some other Church; if it be substracted, they may sue in a Cause of Substraction of the Annual Ecclesiastical Pension.
10. 10. If any Rector or Vicar of any Church do make his Boasts, that there are such Tithes, or such a Portion of Tithes, or such a Pension in such a Parish (or by such a Rector or Vicar due to him in Right of his Church; the Parties grieved may commence Suit against him in a Cause of Jactitation of Tithes or Yearly Pension.
11. 11. If any utter any reproachful Words, (though not Defamatory) that is, such as note or presume any certain Crime; for the which Words they may be Ecclesiastically corrected: (*viz.*) If any out of an angry, malicious or passionate Mind, utter these or like Words; *Thou art an unbonest Liver, or thou art a Lye, carest not what Untruth thou affirmest; or thou art no more to be trusted upon thy Word than a Dog: Thou art an angry Knave; or thou art a Drab, or a Scold, a Fade, a filthy fellow, &c.* Although formerly this Word *Knave* was only reproachful, but only signifying the Male kind, yet otherwise now, being accounted by all a reproachful Word; and if, upon these Words, no Action lies at the Common Law, then may they sue for these and the like Reproaches in the Ecclesiastical Court, in a Cause of Detraction or Reproach.
12. 12. If Fees due to a Proctor in any Ecclesiastical Cause are substracted, the Proctor may sue before the Ecclesiastical Judge, in a Cause of Substraction

See Lind. de
Sententia ex-
com. c. 1. gloss.
upon the word
Quacunqve
Causa. Sect.
Item excom.

of Fees due to him in an Ecclesiastical Cause. 13. If one
 and the same Patron hath presented two Clerks, one to
 the Rectory, the other to the Vicaridge, of one and the
 same Church; or if two Persons, having the Advowson
 from one and the same Patron, have presented each of them
 a Clergy-man, and they both are admitted; if one of them
 destroys the Profits, and gather them off the Ground, the
 other has an Action against him in a Cause of Spoliation or
 Waste: The Reason is, because in this Case it is not con-
 sidered as to the Right of Presentation, for they both
 derive their Title from one and the same Patron, so that
 the Right of Patronage is no way injur'd: In many Places
 within this Realm, there are three Rectors in one and the
 same Church. 14. Also Causes of Substraction of Mor-
 tuaries ought to be tryed and determined in the Ec-
 clesiastical Courts, though they cannot be sued for, except
 in those Places where they are payable, and according to
 the Rate and Value following, *viz.* If the Goods of the
 deceased, the Debts being paid, amount not to the clear
 Value or Sum of Ten Marks, nothing ought to be paid;
 if above the Sum of Ten Marks, and under Thirty
 Pounds, then Three shillings and fourpence is due: If the
 amount to Thirty Pounds and above, but under Forty
 Pounds, then there is Six shillings and eightpence due: If
 Forty pounds and upwards, then Ten shillings is due,
Stat. Hen. 8. cap. 6. 15. Concerning Personal Tithes al-
 so all Men, (*viz.*) Merchants, Buyers, Sellers, and Work-
 men of Cloth, were wont to pay to the Rector and Vicar of
 the Parish wherein their Family inhabited, and received
 the Sacrament, the Tenth part of their Gain (by the Name
 of Personal Tithes) before or upon the Feast of *Easter*, for
 the Year then past (their Charges being first deducted.)
 But all hired Servants were to pay a Tenth part of their
 Wages, deducting first the Charge of their Clothes. But
 these Causes are now prohibited by the Statute of this King-
 dom, except in some Cases and some Places, in which these
 Personal Tithes were payable for the space of Forty Years
 either before the said Statute came forth; and observe,
 for the proving and justifying of the Causes, (*viz.*) to
 prove the Gain, and the Tenth part of the Wages, the De-

14.
Mortuaries.

15.

fendant (by the said Statute) is not to take his Oath, or to undergo his Examen by virtue of the said Oath, upon the Positions of the Libel touching the Premises, so that the Plaintiff can have no Relief in his Proof by the Defendant's Answer, as in other Ecclesiastical Causes. But the Plaintiff in these Cases ought to prove his Intention touching the Tenth part of the Profit, or Tenth part of the Wages, by some

16. other Means. 16. If in any Village or Hamlet any Chapel has anciently been founded, and the Rector or Vicar in whose Parish the Village or Hamlet is situate, was wont formerly to celebrate Divine Service there by himself or his Curate; if this is denied to be done, there lies an Action in that Case before the Ecclesiastical Judge, (*viz.*) any Inhabitant of the said Village may sue the Rector or Vicar in a Cause of Substraction of Divine Service in such a Chapel. 17. In divers Parts of this Kingdom, and especially

17.
Seats in the
Church.

some Parts of *Wales*, the Seats of the Church, or rather the Right of sitting and hearing Divine Service in such Church, belongs to certain particular Men who are Lords or Owners of Houses and Dwellings within that Parish, and have been so Time out of mind, so that none may be permitted to sit there: If therefore any Man intrude himself into any of these Seats, and disturb the Lord or Owner thereof in his Right of sitting and hearing Divine Service there, or do boast himself to have an equal Right of sitting and hearing there; in this Case an Action lies against this turbulent Person, in a Cause of Disturbance or Boasting of the Right of sitting in such a Seat in such Church. And if the Plaintiff prove his Possession or Right of sitting and hearing Divine Service in such a Seat, and that the Defendant did either disturb him, or boast as above, he may obtain Sentence for his Right of sitting there; and his Adversary is to be restrained from this disturbance and Boasting, and is to be condemn'd in Charges of Suit. 18. If a single Man (that is, one unmarried) having treated with the Father of that Woman he intends to take to Wife, and gains his Consent that he shall marry his Daughter, and a Promise likewise of a certain Sum of Money with her in Marriage; but the Marriage being consummate, the Father refuses to pay the Sum promised

In this Case, the Husband may commence an Action against the Father before the Ecclesiastical Judge, in a Cause of Substraction of a Dowry in consideration of Marriage, and no Action lies at the Common Law; but it is otherwise, if he promise to pay a certain Sum of Money down upon the Day, or some Days after the Marriage, for then an Action lies at the Common-Law. Though many Years since, some eminent Lawyers of this Kingdom were of Opinion, That in either of the aforesaid Cases, the Cause was to be commenced before the Ecclesiastical Judge; the Reason they gave for this their Opinion was, Because these Promises and Stipulations seem to be of the same Nature with a Matrimonial Contract: And the Knowledge and Cognizance of Matrimonial Contracts and Causes belong solely to the Ecclesiastical Judges, thence they draw this Conclusion, That these sorts of Contracts ought likewise to belong to the Ecclesiastical Judges. 19. And it is generally to be noted, That the Ecclesiastical Judges may lawfully proceed upon any Cause, of which the Canon or Ecclesiastical Law takes any Cognizance to try and determine, so as the Principal or Statute Laws of this Kingdom contradict it not, or as no Action or Plea may be instituted or commenced at the same Matter at the Common-Law. This has been argued in a Consultation had between some eminent Persons, (Learned in the Statute Laws of this Kingdom) and certain skilful Judges and Advocates of the Court of Chancery. 20. And Lastly, observe, That in certain Cases, the same Crime may be punished, both in the Spiritual Courts, and at the Common-Law, but not after one and the same Manner; for at the Common Law they suffer to their Corporal Punishment, but in these Courts as to the Health of their Soul. *

19.

20.

* There are other Causes not

mentioned in this Sect, which are spoke of afterwards in this Book.

B 3

S E C T.

S E C T. 2.

Of the different Way of Proceeding which Causes require.

1. *Plenary or Ordinary Causes, how defined, and why so called, and what manner of Proceeding they require.*
2. *Which are the Causes that require such a manner of Proceeding.*
3. *Summary Causes, why so called.*

THese Causes, in respect of their different Way of Proceeding, are Two-fold, Plenary and Summary.

1. Plenary Causes, or Ordinary Causes, are those which require a solemn Order in the Proceedings; as the Contestation of Suit, a Term assigned to propound and involve all Acts, &c. a Term to conclude, and a due Form of concluding in that Term, &c. and thence it is they are called Plenary.

2. What Causes these are that require this manner of Process, must be learnt from those Learned in the Civil Law; however, these following Causes, by ancient and daily Practice, are found to be Plenary Causes, (*viz.*)

Every Testamentary Business, and Contests about Testamentary Administrations, except in the Prerogative Court of Legacy.

Defamation or Reproach.
 Divorce or Separation from Bed and Board.
 Dilapidation.
 Jactitation or boasting of Matrimony.
 Subtraction of Procurations.
 Subtraction of an Annual Pension.
 Perjury at the Instance of a Party.
 Notorious Simony at the Instance of a Party.
 Correction of the meer Office, or voluntarily promoted.
 Notorious Usury at the Instance of a Party.
 Injection, or laying violent Hands upon a Clergy-man at the Instance of a Party.
 Impediment of Marriage.
 Right about Seats in the Church.

All Causes of

And it is to be particularly observed, That if in any of these Plenary Causes any proceed summarily, that is, without Contestation of Suit, &c. all the Proceedings are immediately null.

3. Summary Causes are such, as respect not this solemn and ordinary Way of Proceeding in Judgment; but they require summary and short Proceeding, and (as they term it) *sine strepitu Judicii, & de simplici & plano*. And these Causes are all those, whereof the Prerogative Court takes Cognizance; for by the Style of that Court, they are all called Summary Causes. And if any proceeds Plenary in these Causes, the Proceeding is not null'd, but more valid: If therefore the Proctors doubt which Causes are Plenary, and which are Summary, they may proceed Plenary, although the Cause be Summary, and by that means avoid all Danger of nulling the Proceedings. And thus you have had an Account of the *Præcognita*, or Things necessary to be known and understood, before we come to speak of the Manner and Ways of administering Justice in these Courts. We shall next come to speak of that, which in the Law is properly called *Judicium*, of what Persons constituted, what Acts are preparatory to it, and what Accidents may intervene betwixt those Acts, and those which constitute its principal Parts, and all this with as much Plainness and Method as is possible.

B 4

THE

THE
PRACTICE
OF THE
Ecclesiastical Courts.

THE SECOND PART.

CHAP. I.

The Manner of preparing for the Administring of Justice in these Courts.

SECT. 1.

Of that which in the Law is properly called *Judicium*.

1. *What it is, how divided.*
2. *Of what Persons constituted.*
3. *What Acts are called Preparatory to it.*
4. *What Acts are properly said to constitute its Parts.*

* *Judicium*
quid sit quæ il-
lius partes en-
latè traditur à
Wesemb. parat.
f. 4. De Judi-
cio per tot. Al-
ciat. prax. fo. 3.
et f. 16. et
fol. 4. Sect. ra-
tione in forma.

I His Word *Judicium* *, as was said before, is a Judging betwixt the Just and Unjust; or it is said to be that which determines, and puts an End to the Cause or Suit, which are indeed the material Parts of it. It is variously divided: In respect of the Antecedent Cause, it is divided into Spiritual and Temporal: In re- spect

et of the Object, it may be said to be General, Universal, Special, Publick or Private, Civil or Criminal, Person, Real or Mixt: In respect of the Form, it may be divided into Ordinary (that is, Plenary) or Extraordinary (that is, Summary.)

2. The Persons constituting * this *Judicium*, are the Judge, who is so called, *à Jure dicendo*, from his determining the Law) the Plaintiff or Actor, (so called, *ab agendo*, from Act, because he first provokes the Judge) the *Reus* or Defendant, (so called, *à Re*, from the Matter or Thing, for whose cause he is convened.) And likewise those Persons who are called *Judicio Assistentes*, those who assist in Judgment: First, those who assist the Parties in Controversie (*Scil.*) the Advocates (called the Patrons of the Causes) and the Proctors. Secondly, Those who assist the Judge, (*Scil.*) the Assessors, (which are so called, because they associate or attend the Judge: See their Office in *Wesembecy*) the Notaries, Clerks, Tribes, Actuaries, Apparitors.

3. That which (according to *Wesembecy*) is called Preliminary to Judgment, (but is no essential Part of it) is the Citation and the mediate Parts, (*Scil.*) the Proofs made in the Cause †. But *Mynsinger* proves the contrary, (*Scil.*) that the *Jus vocatio*, this calling to Justice, or the Citation, is to be accounted for the very Foundation of the Judicial Order, being as it were the Cause *sine qua non*.

4. The Constitutive or Essential Parts of this *Judicium*, are, First, the *Litis Contestatio*, the contesting or joining Suit: or before the Judgment or Contest is begun (which is not before this Part of the Proceeding call'd the *Litis Contestatio*) cannot be said to ask any Thing. The Second Part is the Sentence, which is the Judge's Pronunciation upon a Cause depending betwixt two in Controversie.

* *Wesemb. para. lit. ff. de Jud. per tot. & in n. 9, 10, 11, 12, Chilian. in prac. c. 22.*

† *De Judiciis parat. ff. n. 6. Alciat. prax. fol. 1. Sect. Substantia Judicii, & fol. 10. Sect. Judicii preparatio.*

SECT.

SECT. 2.

Of the Foundation or Beginning of this *Judicium*,
which is the Original Citation.

1. What a Citation is.
2. What it ought to contain.
3. The Differences of Citations, and by whom obtained.
4. To whom directed, and by whom and how executed.
5. How certified.
6. An Authentical Certificate, what it is, and how made.

† *Que sit, quatu-
plex, qua for-
ma, & quod
debet contineri,
& in qua for-
ma vel solem.
debet certifica-
ri, plenius tra-
ditur à We-
semb. in para-
lit. ff. tit. de in-
jus vocando per
totum Maran-
ta in Specul.
aureo c. de ci-
tat. Secinus de
cit. art. 20.
Lantr. de Cita-
tion. per totum.
Wesemb. pa-
rat in Cod. k. t.
per tot. Myns.
Obs. 79. Cent. 1.*

1. A Citation †, or this *Jus Vocatio*, is a Judicial Act whereby the Defendant, by Authority of the Judge (the Plaintiff requesting it) is commanded to appear in order to enter into Suit, at a certain Day, in a Place where Justice is administered.

2. The Citation ought to contain, 1. The Name of the Judge (and his Commission, if he be delegated); if an Ordinary Judge, with the Stile of the Court where he is Judge.

2. The Name of him who is to be cited. 3. An appointed Day and Place where he must appear; which Day ought either to be express'd particularly to be such a Day of the Week or Month, &c. or else only the next Court-day (or longer) from the Date of the Citation, in which the Judge sits to administer Justice: The Time of appearance ought to be more or less, according to the Distance of the Place where they live. 4. The Cause for which the Suit is to be commenced.

5. The Name of the Party at whose Instance the Citation is obtained. These Words may also be added (Scil.) If the said Day be a Court-day, or otherwise the next Court-day following, in which the Judge happens to sit to administer Justice. The Reason of this is, lest that Day of the Month so particulariz'd in the Citation should happen to be a Holy-day, which (as was said before) is no Day for administering Justice.

3. As to the Differences of Citations, they are such as contain either a peremptory Command to appear, or else are Mandatory and Inhibitory, where the Defendant is not only

only warned to appear; but the Judge, before whom the Cause lately depended, is forbid to proceed any further: or else they are Mandatory and Intimatory; as where Executors of Wills do not only cite all the next of Kin to appear and see the Wills proved, but do intimate to them, that if they appear not, they intend to proceed, &c. Likewise Citations (in respect of their End) may be said to be either General, (as where the Defendant is cited to attend the whole Cause and Order of Proceedings) or Special, (as where the Defendant is only cited to do or perform some particular Act to be done in the Proceedings, &c.) Also in respect of its form or manner of Execution, a Citation may be said to be Publick, (that is, that which is executed by a publick Edict in the Church, &c.) or else Private, which is either verbally executed upon the Defendant's person, or by Notice thereof left at his House; or, Lastly, a Citation may likewise in this respect be said to be Real, being executed upon the Goods, as in Maritime Causes, &c.

The Original Citations, (which are only Mandatory or Intimatory, &c.) may be obtained by the Plaintiff himself, or any Solicitor he employs to go to the Court in his Name; the other, which we distinguish by the Name of Inhibitory Citations, (being for the most part issued forth upon definitive Sentences, or other Grievances done to the Party complaining, by the inferior Judges who are called those from whom it is appealed) are obtained (with much ease) of the Judges of the Arches and Audience, by the Party concerned, or his Proctor, who carry the Citation and Inhibition (ready drawn in Writing, and fit for the Seal) to the Judge, the Seal of whose Office they having requested, is immediately put to them. It is apparent, that formerly (for the space of a hundred Years, as appears by the Records of the Court of the Arches) all Citations and Inhibitions were wont to be drawn by the Proctors, and not by the Apparitors, Solicitors, and other unskilful Persons, as is too frequent in the said Courts of the Arches, to their great Disgrace, and oftentimes to the Prejudice of the Parties in Suit.

4. These Citations are usually directed to all Rectors, Vicars, (as Mr. Clarke says) Chaplains, Curates, Clerks, and

and literate Persons, whatsoever or wheresoever constituted, throughout the Province of *Canterbury*, or they may be directed to any one (or more) particular Persons (who must be named in the Citation) giving him or them Power to execute the same: So that every literate Person, who can read any Thing that is written or printed (though he understand not the *Latin* Tongue) may be accounted a *Mandatory* to execute the said Mandate; in doing of which he ought to observe this: (*Scil.*) He ought to shew the Party cited his Letters *Mandatory*, under the common Seal of the Judge, and by vertue thereof, he ought to cite the Defendant to appear in such a Place, and at such a Day (as mention'd in the Mandate) and before such a Judge, to answer such a Plaintiff (naming him) in a Cause of, &c. And if the Party cited request a Copy of this Citation, the *Mandatory* ought to give him a Copy, and receive only Sixpence for that Copy, if it be an ordinary or usual Citation; that is to say, if he be to answer in a Cause of Substraction of Tithes, Defamation, or Legacy, &c. But if it be an extraordinary Citation, containing an Inhibition, or Intimation, and much in length, then he may ask Twelvence for the Copy of it if he will. Mr. *Clerke* surely does not intend, that such a *Mandatory* as he speaks of should execute an Inhibition: If he does, it is a Thing not reasonably practised; for one of our learnedst Notaries seems to have Learning little enough to read over the Contents of an Inhibition (to the Judge or Register on whom it is to be executed), and to explain their *Ars Notariata* Grammatically.

5. The *Mandatory* ought to be personally in Court before the Judge, to certifie, and make Oath, how and in what manner the Defendant was cited; or else the *Mandatory*, or the Plaintiff himself, ought to certifie his Proctor before the Day of Appearance the Name of him who executed the Citation, and the Day and Place in which he cited the Defendant, that so the Plaintiff's Proctor may draw an Authentical Certificate thereupon. In some Courts, if a *Mandatory* (who is known to be a Person of Credit) writes a Certificate to the aforesaid Purpose, it is good without an Authentical Certificate.

6. This

6. This Authentical Certificate is a kind of solemn Writing, drawn or confirm'd by some publick Authority, and ought chiefly to contain the Name of the Mandatory, and wherein is directed to the Judge with his wonted Style; likewise the Day and the Place in which the Defendant was cited, and the Causes of his Appearance; in Testimony whereof, some Authentical Seal ought to be put to it, (viz.) of some Arch-deacons, Officials, Commissaries, or Rural Dean's Seal: To all which Certificates in all Causes, since the Memory of Man (by the Style of these Courts) there was as much Credit given, as if the Mandatory had personally made Oath of the Execution thereof. See *Lindwood, Const. Othob. §. De sigillis autent. & custod. eorum.* But the Party grieved by this Certificate, (if it prove fictitious and false) may object against, and oppose it by way of Appeal: And they, who set their Authentical Seal to it, ought to undergo the Penalty contained in the Constitution of Othobon. *§. Quæ literæ falsæ dicuntur, & pœna eorum qui isdem uti præsumunt*: See the Gloss upon the Words, *hæc Scripturæ pœna falsariis debita, &c.* And it is to be observed, that the Arch-deacon, Official, Rural Dean, &c. who set their Seal to the said Certificate, ought to certify that they put it to at the special Instigation and Request of the Mandatory, or else it avails not: This has been objected, and with Success.

CHAP. II.

Of Proctors, and their Office in bringing in these Citations.

SECT. I

Their manner of Constitution.

1. *What a Proctor is.*
2. *Their several Ways of Constitution defined and shewn.*

1. **T**HE next Thing considerable in order, seems to be the Proctor, his Power and Office, &c. seeing no Citation,

* *Fide Procur.*
l. 1. l. 71. l. 72.
Cod. eodem
Umm. disput.
3. th. 1. n. 2.
Jac. Bouric. de
Officio Advoc.
ti, c. 1. 2. Spe-
cul. hoc tit. in
rub. eodem, n. 1.
Wesemb. ff. de
proc. n. 1, 2.

† *Quoad for-*
mam & mate-
riam constitu-
tionis, vide We-
semb. ff. de
procur. numb. 5.
& 6. per tot.
Myns. obs. 46. 1.
hoc tit. Maran-
ta in Specul.
par. 4. dist. 1.
n. 35. in Pract.
& Spec. in tit.
de procur. Sect.
ratione form.
num. 13. 19. &
n. 4. Cujacii
Obs. l. 7. c. 26.
Chilia in prac.
12. n. 2.

tion, though executed, can be brought into Court but by the Proctor, nor any Notice taken of it unless exhibited by him. Therefore, among the several Divisions of Proctors (in respect of their Offices) we shall only make use of that Definition best fitting our Purpose, and in this Place it is *Procurator Judicialis*, a Judicial Proctor * which is intended; (that is) he who manages any one's Concern in Court of Judicature, by the special Mandate of his Client. The Division of Judicial Proctors, see in *Myns. Inst. Action. F. 10.*

2. A Proctor is constituted either by Proxy, † or *apud acta Curiae*, or before a Notary Publick, and Witnesses. A Proxy (which *Wesembecy* ranks in the number of Extra-judicial Constitutions, as also the other before a Notary-Publick) is a Power or Mandate given to the Proctor by his Client to appear for him, and to do all Things for him, which he might possibly do if he were personally there himself, with Power to substitute another in his stead, so often as he shall be absent upon urgent Occasions. And that it may be Valid and Authentick, it ought to contain the Name of the Party constituting, the Name of the Proctor constituted; also against whom, in what Cause, before what Judge, and to what Acts he is constituted, (*viz.*) to act, offer, or receive a Libel; to Except, contest Suit, produce Witnesses, hear Sentence, &c. in which respect these Mandates or Proxies may be said to be either General, (giving full Power to prosecute the whole Cause while it is Controversie) or Special, (which gives Power only to do or perform some particular Act, &c.) and this Mandate, that it may be Authentick, must be sealed in the same form as Authentick Certificates (before-mentioned) are sealed; of which, see *Lindwood, Constitutio Ortboboni C. de Officio procuratorum*: These Mandates ought likewise to make mention, That they are ready to confirm whatsoever their said Proctor shall do in the Premises. Another sort of Extra-judicial Constitutions is that which is made before a Notary Publick, who draws up a publick Instrument thereupon, and exhibit it into Court; and likewise a Proctor is constituted before two or more Witnesses, who give their Testi-

mony

ony concerning this Constitution of the Proctor. A Proctor is only then said to be properly constituted Judicially, when the Party constituting is present in Court, and makes choice of his Proctor before the Judge, and confirms his Person, and promises to ratifie whatsoever his said Proctor shall act or do, (which Election he desires may be put into the Court Act) or when he, or some in his Name, offer to the Judge a Letter, or other Writing, which makes appear whom he makes Choice of for a Proctor; the Contents of which is to be inserted in the Acts of the Court. Mr. *Clerke* seems to reckon a Constitution before a Notary Publick to be a Judicial Constituting of a Proctor, but the Mistake will easily appear by *Wesembey ff. T. De Procurator.*

S E C T. 2.

How and when Proctors may be Substituted.

1. *What a Substitution is, and the several Kinds of it.*
2. *When a Proctor may substitute another in his stead in any Cause.*

A Substitution is the putting any one in his stead, giving Power to act in his absence. There are several Sorts of Substitutions, some are Testamentary (which are likewise either General or Special), others Pupillary; others such as are made by the Officers or Assistants in Courts of Controversie, which agrees properly with the Definition here mentioned.

2. And though a Proctor has Power given by his Proxy to substitute any other in the Cause, so often as he shall be absent from the Court; yet he cannot substitute any Proctor before the contesting of Suit called the *Litis Contestatio*, because he is not (till then) either Lord of the Suit or Controversie, nor can it (properly) be called a Suit: But after his *Litis Contestatio*, or contesting of Suit, all Things whatsoever acted or done by the Substitute Proctor are valid, and

and good in Law, as if done by the Original Proctor: *Wesemb. ubi. f.*

S E C T. 3.

When a Proctor is said to cease to be Proctor in Cause, and when not.

THE General Rule is, *Unumquodque dissolvi eodem modo quo Colligatum est*; Every thing ought to be dissolved after the same manner, (that is) by the same Power it received its Being; so that a Proctor (being constituted by mutual Consent) may likewise be released after the same manner. But this General Rule admits of several Limitations, though before the Suit is contested, (in which State the Civilians term the Business to be, *uti res integra*) the Proctor may be revoked * or changed: The several Causes of Revocation are at large enumerated by *Wesemb.* Likewise the Client dying before the Suit is contested, though the Proctor has exhibited his Proxy, and accepted the Libel &c. yet he needs not further defend the Suit, but may let his Adversary call the Executors or Administrators of his deceased Client, and begin the Suit anew, if any Action lie against them for that Fact; but it is otherwise, if the Matter ceases to be *integra* or whole, that is, if the Suit has been contested. And on the contrary, if the Proctor dies after the Suit is contested, the Mandate is absolutely revoked, † though the Substitution made by that Proctor, after the Suit so contested, is not absolutely revoked by the Death of the Party substituting: Also the Proxy is said to be revoked when the Instance is ended, (*viz.*) Sentence being given in Cause, and a Protestation of an Appeal being interposed * nor can the Proctors act or do any Thing on either Party except they exhibit their Proxy for their Client anew, after the Sentence is laid, which often happens when the Proctor appealing comes before the Judge (from whom he appeals) and alledges, that he has so appealed, and desires Dismission, &c. or when the Party Appellant, who got the Cause, comes and demands Sentence to be put in Execution

* *f. T. de procur. Zouch. Elementa Juris. Prud. p. 5. Sect. 8. Sect. & procur. Mynst. Inst. T. de Mand. Sect. Relat.*

† *Ranch. ad Guid. papam. p. 119.*

* *Wesemb. ubi f. Berlachin. repert. verbo procurator appellans. verbis qui eum item verbis. p. 234.*

on. And though the Appellate do obtain Sentence of Remission, and do present this Letter of Remission to the Judge from whom it was appealed; yet he can do nothing in the presence of his Adversaries Proctor, but must call the principal Party by new Process, in like manner whether it is appealed or not: After Sentence is given, the Party, who got the Sentence, must call the Adverse Party by way of Process, to see the Sentence put in execution, and both of them must institute their Proctors as at first.

But if the principal Party die after the Suit has been contested by the Proctors, the Proctor of that Party surviving (whether Plaintiff or Defendant) is (by the Constitution of Suit, *Res nimirum desinens esse integra*, as the Civil Law calls it) made Lord of the Suit, * and may prosecute and defend the Suit, and do all Things which ought to have been done, if the principal Party had been alive; and likewise obtain a Definitive Sentence, but we must distinguish betwixt Real and Personal Actions, for all Actions that are Personal † do die with the Person: Such as are Actions or Causes for Defamation or Matrimonial; and such-like: But Real Actions which any way respect the Goods, or the right any one pretends to a Personal Estate, &c. then what above said takes Place. Likewise, if any appeal from any pretended Grievance which they suffer in the Proceedings before the Definitive Sentence, and the Judge to whom it was appealed pronounceth, That it was unjustly appealed; and thereupon remits the Cause back to the Judge from whom it was so appealed, and the Party Appellate exhibits the Letters Remissary before the Judge, from whom, &c. and makes Request that they may proceed according to the former Acts, and in the same State in which the Cause was at the Time of the appeal; in this case, the Proctor of the Party Appellate may, in the Presence of the Proctor who appealed, act and do all Things as if it had not been appeal'd at all: For the Proctor of the Appealing Party (nor of the other Party sure) does not cease to be Proctor; if the Appeal be made from some Grievances committed after the contesting of Suit, but before the Sentence, seeing the Procuratory Mandate is of force until the Definitive Sentence. And thence it happens,

* Zouch, Elem. Jur. prud. p. 5; Sect. 8. Sect. 8. Et proctor.

† Inst. Sect. ovum. de Success. Myns. Grav. ad vlt.

* Gail. l. 1. obs. 109. n. 3. 4. 5. &c. Grav. ad vlt. l. 4. c. 4. n. 39. verbo hujus foris.

that the Party Appellate needs not (in this sort of Remission) call the principal Party, who appealed, to see further Proceedings, as above.

Having now considered this Animal (called a Proctor) in his Original State, and those other adventitious Circumstances he may perhaps fall under; let us now proceed to the *Hoc age*, the Business he is to do, with its Manner and Form.

S E C T. 4.

The Manner of bringing Citations into Court by a Proctor.

1. *How the Citation is exhibited by the Proctor.*
2. *The Party to be cited not being found, how must it be certified.*
3. *The Citation Viis & Modis defined, how obtained, how executed, and how certified and brought into Court.*

HAVING presupposed the Proctor to be constituted in some of those Forms afore-mentioned, we are to consider his manner of appearing in Court. 1. Therefore the Proctor of the Plaintiff in that Day, on which the Defendant is summoned to appear, is to exhibit his Proxy for his Client, &c. and brings into Court the Original Citation.

2. Now this Citation being a Personal Citation, (that is to say) such a one as could not be executed, unless upon the proper Person of the Defendant, and the Party so to be cited having perhaps absconded himself, that he cannot be met with: In this Case the Proctor ought to alledge it, and shew the Mandatories Certificate pursuant to such his Alledgment; and thereupon he ought to Petition, that the Defendant may be cited Personally to appear (if he can so cited) to answer the Contents of the former Citation and if not Personally, then by any other Ways and Means so as the *Pars Rea*, or Party to be cited, may come to the Knowledge thereof; and this is it which is called Citation

per modis, or *Citatio Publica*, a Publick Citation, being executed either by Publick Edict, (a Copy thereof affix'd to the Doors of the House where the Defendant dwells, or the Doors of the Church within whose Parish he inhabits) or (as my Author tells me) by Publication in the Church in Time of Divine Service; or *per campanam*, the Tolling of a Bell; or *per Tubam*, the Sounding of a Trumpet; or *Vexilli erectionem*, the Erecting of a Banner.

This being done, a Certificate must be made of the same, and the Citation brought into Court, (as is even mention'd) and if the Party cited appear not, the Plaintiff's Proctor must accuse his Contumacy, (he being Three times called by the Crier of the Court) and in Penalty of such his Contumacy, he must request that he may be excommunicate.

CHAP. III.

Of Excommunications.

SECT. I.

*What an Excommunication is, and the several Sorts of it.
How obtained, and against whom, and in what Cases.
How denounced.*

IT is possible, many Things may intervene before the Parties appear Face to Face in Court; one Reason may be, the Defendant's Obstinacy in not appearing; so the only Remedy the Plaintiff has in these Courts in such Cases, is by way of Excommunication; which we shall consider in all Respects.

An Excommunication in General, is a Power or Authority invested in the Church, * which secludes those, on whom it is inflicted, from having or maintaining any Communication or Society with those who are Members of the Church: And this is Twofold; the one is the Major or Greater

* *Vide manual.
juris de verb.
sign. à Sebast.
Almers verb.
excommunicatio.*

ter Excommunication, which separates those on whom it is inflicted, not only from the mystical Body of the Church and from Spiritual Communion, or receiving the Sacraments, as well actively as passively, (that is, that they may neither receive them themselves, nor administer them to others) but also from the Society of the Faithful, as well in Humane as Divine Affairs. The other sort of Excommunication is called the Minor or Lesser Excommunication, being that which separates only from the Passive Communion of the Sacraments, (that is, the Receiving of them) does not forbid the Administering of them; and both sorts are inflicted, either by the Law, or some Canon, or by a General or Particular Synod, (which is Perpetual, and binds those who commit those Crimes, for which this Penalty is inflicted, are said to be excommunicated *ipso facto*; which, see *Lindwood, de Sententia Excommun. C. ult. gloss.*) Or, Secondly, These sorts of Excommunications may be inflicted by the Sentence of a Judge, when, and as he has occasion to punish the Contemners of Ecclesiastical Jurisdiction.

2. These Excommunications to be inflicted upon those who are Contumacious in not appearing, &c. are obtained by the Proctor's Petition to the Judge. For the Citation (either Personal, or *Viis & modis*) being duly executed and brought into Court as is before directed, and the Party cited being so propounded Contumacious, and decerned to be Excommunicate; the Plaintiff's Proctor offers a Schedule of the Excommunication to the Judge, who reads it, if he is in Holy Orders, if not, then it is given to one who is in Holy Orders, who is constituted to this Purpose by the Judge: This Schedule being read, it is left in the Hands of the Register, who makes the Excommunication thereof. But the Letters of Excommunication ought not to be sealed under the Office Seal; at least they ought not to be removed out of the Office that same Day in which the Sentence of Excommunication was pronounced; for the Party cited has a whole Day allowed him for his Appearance, that if he appear in any time of the Day (though after the Court) in which he was cited to appear, and does constitute his Proctor, (who in that same Day exhibits into

Register's Office an Authentick Certificate for the Defendant) he ought to be absolved from the said Sentence of Excommunication without paying Contumacy Fees, (paying only Sixpence for the Act, and for reading the Schedule of the Excommunication) and this Appearance (whether by himself or his Proctor) being in that same Day, is the Style of the Court called a Good Appearance. As those who are liable to this sort of Penalty, they are not only such as are before hinted at, (*Scilicet*) such as desert and contemn the Ecclesiastical Jurisdiction in not appearing, &c. (whether Witnesses or others) but likewise those who are said to incur the Penalty *ipso facto*: In those Cases enumerated by Dr. Lindwood, *de Sent. Excommunicationis* c. ult. gloss. upon the Words *Candelis accensis*; and in especial manner, all those who are conversant, or hold any Communion with an Excommunicate Person. And to this end (not only by the Laws of the Land, but by ancient and modern Practice) it is provided, That every Excommunicate Person be publickly denounced Excommunicate in the Time of the Divine Service, celebrated within the Parish Church where he lives, whiles the greater Part of the Multitude is present, that so by this Means not only the Excommunicate Person himself, but likewise the other the Parishioners of that Parish, may have Notice thereof; so as that they may have no Conversation with him after they are so Excommunicated, unless it be with design of reconciling them to the Church, or in order to procure them their Letters of Absolution: And these Persons being otherwise conversant with them, are Convict and Excommunicate *ipso facto*, and as such are to be denounced, * and Penance enjoined them, before they are Absolved with Condemnation of Expences. Let all People therefore observe thus much, That this Sentence of Excommunication is not a Thing of so light a Value, as many suppose them; because not only by the Ecclesiastical Law approved by the Laws of this Realm) the Ecclesiastical Judge may proceed against them, and those who are conversant with them as above; but also, if they stand Excommunicate for the space of Twelve Months after the Excommunication is denounced, the Ecclesiastical Judge may proceed

Lind. de Im-
mun. Eccles. c.
Seculi princip.
Sect. Ac quan-
doque verb. ma-
culan.

* They must
be cited first.
Lind. ubi supra
c. Quia divinis
Sect. ult. verb.
Rite. See how
many ways it
is said to be
despised, de
sent. excom. c. 1.
gloss. ult.

* Lind. de hæ-
ret. c. finaliter
Sect. ad hæc
verb. vehemen-
ter susp. Et
verb. Originis
Jo. An. sup.
quinto Decretal.
in Rub. circa
finem & c. 3.
versus finem de
her. l. 2. de pre-
sump. c. lit. ras
& not. per Ar-
chi. e. t.

ceed against them in a Cause of notorious Heresie. * Neither have these Excommunicate Persons any Benefit of the Laws of the Land (either Spiritual or Municipal) more than those Men who are called *Bannati*, or Outlawed. Many other Penalties are inflicted upon them by the Ecclesiastical Law, for they are not only secluded from the Society of Men whilst alive, but when they are dead too, being forbid Burial either in Church or Church-yard.

3. The Letters of Excommunication being ready under the Judge's Seal, as aforementioned, the Plaintiff, or other Person concerned, must send the same to the Rector, Vicar or Curate of the Parish, to which the Excommunicate Person belongs, with Orders to publish the same in time of Divine Service upon some Holy-day or Lords-day. The which being pronounced, the Rector, Vicar, Curate, or other Priest who denounced the same, ought to make Certificate of such Publication, either Personally, or by Letter, or by his Certificate annexed to the same, containing the Name and Surname of him who denounced them, the Day and Place where they were Published; the which they ought to be delivered to the Party, at whose Instance they were obtained, and ought to be certified in due time. In order whereunto, likewise the Parties who take out the Letters of Excommunication, ought to take Care that they be delivered to the Rector, Vicar or Curate aforesaid, the Day before that Lords-day or Festival in which they would have them denounced, or at least that same Day before Morning or Evening Prayers, that so he may read them and do what belongs to his Office. And in this Case, the Rector, &c. (having such timely Notice for the publishing of these Letters of Excommunication, as aforesaid) ought to take Care that they be published without Delay, and being so published, that they be delivered and certified as above; for if they neglect so to do, they are to be punished (by Suspension from their Office) by the Judge who sends forth these Letters of Excommunication. For they ought to remember, that they are strictly commanded by the said Letters of Excommunication, not only to publish the same forthwith, but also to certify the Judge who granted them.

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them concerning the Day, the Manner and Form wherein they published them.

S E C T. 2.

The Manner of proceeding against Excommunicate Persons.

1. *Those who stand obstinately Excommunicate until the Fortieth Day, and seek not for Absolution until then; how they are proceeded against.*
2. *Those who having been formerly absolved from the Sentence of Excommunication, if they incur the like again, how they may be punished.*
3. *What the Letters of Significavit for arresting an Excommunicate Person are, how and when obtained; and how the Writ is obtained upon them.*

IN these Days, the Malice and Contempt Men bear towards the Ecclesiastical Jurisdiction is so great, that out of a Resolution to protract Suit) they stand Excommunicate sometimes Thirty, sometimes Thirty eight or Thirty nine Days, and then on the Fortieth Day (to avoid Imprisonment by the King's Writ *de Excommunicato Capiendo*, and the Expences of Suit they are liable to upon that Occasion, being drawn to it by no Remorse of Conscience) they come and desire their Absolution; boasting that they can have their Absolution before Forty Days be elapsed, paying only Contumacy Fees: Therefore, to avoid the evil, the Ecclesiastical Judges may, if they please, proceed of their meer Office, or at the Promotion of the Party who suffers by retarding the Suit) against these Excommunicate Persons, and Contemnors of Ecclesiastical Jurisdiction; and unless they produce sufficient and conclusive Reasons for their standing so long Excommunicate, (*viz.*) because they were beyond Seas, or in some remote Parts of the Kingdom at such time as the Excommunication was denounced, and for at least Thirty Days after) they may be enjoyned Penance, and may be condemn'd in Expences

ces made in that behalf, besides the Contumacy Fees; and by this Means they will be deterr'd from such an audacious Contempt for the future; and then the Poet's Words may be fitly applied to them,

*Oderunt peccare, mali formidine pœnæ
— & non virtutis amore.*

By this means also, Suits will be much abbreviated, of whose Tedioufness there is too general a Complaint; For if the Defendant should be Excommunicate as aforesaid, before he appear by himself, or his Proctor, to answer in any Cause; or if being cited to answer Personally to the Positions of a Libel, he do obstinately stand Excommunicate for the Time aforesaid before he answer; or if, having given his Answer, he neglects to undergo his Examen (that is an Acknowledgment he ought to make thereof before the Judge, owning that his Answer to be true) within the Time appointed him for that Purpose; and for that Reason he is also Excommunicate, and stands so, in Form as aforesaid; or if, being examined, he does perhaps refuse to answer to some one Position; or says, he is not bound by Law to answer to such a Position. This Matter being determined, and the Judge delivering his Opinion, That the Defendant has not answered fully, and that he ought to be called to make a full Answer; or if he deliver his Opinion, that he ought to answer to that Position which he has absolutely refused to make answer to, and does order the Defendant to be cited, to make his Answer to it accordingly: If, I say, the Defendant being lawfully admonished to make Answer to the Premises, but takes no Care to answer accordingly, but he becomes Excommunicate for such his Contempt, and continues in that State by the Space aforesaid; or (Lastly) if any one being condemned by a definitive Sentence to the Payment of a Legacy, Tithes, or the like, and being admonished to satisfy the Sentence, does run the Hazard of an Excommunication, and does stand so Excommunicate by the Time aforesaid, before he doth satisfy this Monition. These, I say, are great Causes of deferring the Proceedings, and the Determination of Causes.

to the great Scandal and Contempt of the Ecclesiastical Jurisdiction; and truly it is an *Enigma* not easily understood, (*Scil.*) to determine, whether the Obstinacy and litigious Humour of the Party in the Suit, is the absolute cause of this Delay and Contempt, or his Proctor. Therefore it is very requisite in all the aforesaid Cases, that the Judges for the future proceed of their meer Office against these manifest Contemners, and Correct them duly, (yea, even with publick Penance) especially if they do dare to in the like Penalty of Excommunication a second Time.

2. But as for those who are so Obstinate, as to dare to incur this Penalty a second Time, in not obeying the Law, or standing to the Mandates of the Church, (if they cannot lawfully acquit themselves of this second Contumacy) the Ecclesiastical Judge may proceed against them in a cause of Perjury; for they having been formerly Excommunicate, are presumed to have taken the Oath [*de parendo iuri, & stando Mandatis Ecclesiae*] at such time as they were absolved from that their first Excommunication, (seeing no Man ought by Law to be absolved before they take that Oath) and therefore by this their second Contempt they have violated that Oath, and are become perjured, and such ought to be punished; but this is rarely practised; however let these Excommunicate Persons take heed how they persist in an Excommunication after having taken this Oath.

3. We come now to another sort of Punishment, to be inflicted upon those who obstinately persist in the Sentence of Excommunication until those Forty Days be elapsed, which are allowed them to seek their Absolution in; and in effecting this sort of Punishment against these Contemners of the Grace of Humiliation, (as the Provincial Constitution terms them) the Legal or Secular Authority is to be implored, * which is done by a Certificate made to the secular Judges, making mention that the Party certified stood Excommunicate above Forty Days, &c. and hence it is called Significatory. This Certificate is obtained by the Proctor of the Plaintiff, who goes to the Judge who granted the Letters of Excommunication) and exhibits these Letters of Excommunication with a Certificate,

* Dr. Coxens's
Apol. p. 1. c. 2.
Fitz. nat. br.
p. 64. Lind. de
Immun. Eccles.
c. Seculi principes de Senten.
excommun. c.
præterea contingit.
See the Penalty of denying this Writ.

making Mention that they were denounced against such one at such a Time and Place; and the Proctor ought to allege, That he hath stood in this Sentence of Excommunication with an obstinate Mind Forty Days and more since the denouncing thereof, and that he does yet stand Excommunicate in Contempt of the Ecclesiastical Jurisdiction: Whereupon the Judge, at his Petition, decrees, That he may be signified to the King's Majesty in order to the taking of his Body. Then the Plaintiff, or his Proctor, shall get these Letters Significatory under the Seal of the Judge (who granted the Excommunication) directed to the King's Majesty, which ought to be delivered to the Chancellor, or some other Officer appointed for this Purpose in the Court of Chancery, from whom they must have the Writ *de Excommunicatione Capiendo*, directed to the Sheriff of that County in which the Excommunicate Person dwells; and there are certain Clerks, who are called [*The Curfitors of the Chancery*], one of which are assigned for every County to dispatch Writs upon these *Significavit*s. If the Excommunicate Person be apprehended upon this Writ, he is to be kept in Prison, until he satisfy * the Church for his Contempt, and his Adversary for his Contumacy Fees, &c.

* *Lind. de immunit. Eccl. c. Seculi princip. glos. upon the Words Satisfactionem nec possunt*, what sorts of Satisfaction is required, and how, and in what Cases, there is a different Satisfaction requir'd.

† *Part. I. c. 2. p. 9. Fitz. nat. brev. p. 64.*

Nor does this, which has been said, extend solely to such Persons as are Excommunicate (for their not appearing at the Instance of a Party, &c. but even all others howsoever Excommunicate, (either by the Archbishop his Office, or the Archdeacon, &c. in their Corrections) only the Archdeacons, &c. must Certifie the Archbishop, That such a Person was so Excommunicate by them, and have stood in the State for the Time aforesaid: And upon this the Archbishop makes his Letters Significatory, and all Things are to be proceeded in as above, *Mutatis mutandis*, of which Certificates, Dr. *Coxens* (in his Apology for the Ecclesiastical Proceedings) speaks more at large. †

S E C T. 2.

the Manner of obtaining Absolutions for all such as are to be Released from the Sentence of Excommunication, and such as are Imprisoned upon the aforesaid Writ.

What an Absolution is, and the several Sorts of Absolutions.

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|--|----------------------------------|--|
| <i>The Causes and Reasons which may be urged to the Judge in order to the obtaining an Absolution.</i> | <i>Which may be these Three,</i> | 1. <i>The Party's Unwillingness to continue in that State.</i> |
| | | 2. <i>The Unjustness of that Cause for which he is Excommunicate, as being such which the Ecclesiastical Judge holds no Cognizance of, &c.</i> |
| | | 3. <i>The Unjustness of Excommunication, (Scil.) a false Certificate, &c.</i> |
- In this Case we must enquire,*
- Whether the Plaintiff can proceed, notwithstanding the Defendant's Objection.*

The Manner of obtaining the Absolution, with the Letters Significatory in order to it, on behalf of such as are Imprisoned.

What is required of those who are to be Absolved.

Absolutions being such necessary Consequences to Excommunications, it seems not improper to make this Discourse concerning them the conclusive Part of this Chapter: An Absolution therefore seems to be no other, than a Releasing or Freeing any one from that Penalty which the Law has inflicted. These Absolutions are of several Sorts, according to the different Circumstances or State of the Matter; some are made *ad cautelam*, or *in diem*, as it falls out in Causes of Appeal sometimes) others are absolute; some are made in *Articulo mortis*, others *Post mortem*, &c.

2. The

2. The Causes and Reasons which may be urged to the Judge, in order to the obtaining of them, may be many; as particularly, *First*, The Parties Unwillingness to continue in that State. *Secondly*, The Injustness of the Cause for which he is Excommunicate, as being such which the Ecclesiastical Judge holds no Cognizance of; and in this Case, if any Man is imprisoned by the Writ *De Excommunicato Capiendo*, (for not appearing to prosecute such a Cause before the Ecclesiastical Judge) the Sheriff (having a Precept to that purpose) may set the Imprisoned Party at Liberty, without having any Respect to the Proceedings of the Ecclesiastical Judge, touching the Cause of Excommunication. * But the Secular Judge or Sheriff ought to be truly satisfied of this, † or else their Officers incur the Penalty of the Provincial Constitution, if they acquit any Excommunicate Person out of Prison before he has satisfied the Law, &c. A *Third* Cause or Motive to be urg'd, in order to the obtaining the Letters of Absolution, may be the Illegality of the Excommunication, (*Scil.*) the Certificate being false, &c. In this Case, the Person so unjustly Excommunicate may appear Personally, or by his Proctor (who must Exhibit his Proxy) and alledge, That the Certificate formerly brought in upon the Execution of the Citation (taken forth against the Client) is feigned and false, and drawn contrary to the Truth, especially in as much as the Mandatory named therein never executed the same, or especially not in that Day, or in that Place, specified in the Certificate; and that it is impossible he should be cited, in as much as his said Client was absent from that Parish at that Time, &c. or he may alledge the Absence of the Mandatory from the Place, and at that Time which he makes mention of in his Certificate, or any other Cause * in order to the disproving the Certificate, (to wit) that the Mandatory cited another Person, and not the Person named in the Mandate, and that the Mandatory executed the Mandate only at one certain Time, and never else (for a Negative conjoined with an Affirmative Allegation admits as easy Proof, as if it were an absolute Affirmative;) and so in this Case, having proved himself present in such a Place at such a Time, he must necessarily be

* *Lind. T. de immunit. Eccl. c. Seculi princip. Sect. Suggestio. Sect. de quantum gloss. upon the Word Adhibetur.*

† *Ubi f. Sect. contra & de Sent. excom. c. praterea per totum.*

* *Vide Alciat. Prax. ubi diverse Cause objici poss. ratione Jud. Citationis loci temporis Citationis, &c. T. de Cit. Sect. quae possunt.*

ent from all other Places at the same Time: [*Nibil enim
besse, & adesse dicitur, uno & eodem instante.*] And it might
fall out, that though the Mandatory at first through
Mistake cited another Person, yet he might afterwards cite
the Defendant's Allegation being admitted, and a Term
being assigned him to prove that his Allegation, he ought
to take the Oath of obeying the Law, and standing to the
Mandates of the Church, and ought to depose into the
Register's Hands the Contumacy Fees; and if he proves
what he so alledgeth, not only these Contumacy Fees
are to be restored him again, but the adverse Party is also
to be condemned in those Charges he is put to, in order to
prove such his Objection: But if on the contrary he fail in
the Proof of it, he (that is, the Defendant) is not only to
be condemned in such Charges, but those Contumacy Fees
which he so deposited, *apud acta*, are to be delivered to
his Adversary, and he is to be denounced *Excommunicate
de novo*, unless he satisfy that for which he is *Excommuni-
cate*. In this Case, the Judge ought not to absolve the
Party objecting against the Certificate, absolutely from the
Sentence of Excommunication, but only *ad cautelam*, or to
a Day which is given him to prove what he alledges,
especially if the Party be *Excommunicate* for not paying
Costs, or that which the Sentence of the Judge has con-
demn'd him liable to) and it is to be observed, (though
the Acts of Courts do not always make mention of it) that
it is but Prudence in the Proctor of the adverse Party (to
avoid Charges and further Contest) either to confess what
his Adversary has alledged touching the aforesaid Obje-
ctions, (if they be true) or to dissent and deny those Al-
ledgments, and protest against them, and desire they
may be rejected. A second Way of Objecting against an
unjust Certificate is, as if any is *Excommunicate* upon a
Certificate, making Mention that the Party was sought at
his Dwelling-House in such a Parish, and because he was
absent, or absconded himself, that he was Cited by affix-
ing the Judge's Mandate upon the Doors of the said Parish
Church: If the *Excommunicate* Person alledge and prove,
That neither he nor his Family dwelt in that Parish for at
least half a Year before, nor ever heard ought of such af-
fixing

fixing the Citation, but that he and his Family, during all that Time, dwelt in another Parish; he is to be Absolved, and ought to have his Charges as above. Likewise if a Citation, *viis & modis*, were granted upon a Certificate of a Primary Citation, or any other Original or Personal Decree, that such a one was sought at such Houses in such a Parish, which are neither the Houses nor the Parish where the Party to be cited inhabits; and if, upon this Citation, the Judge order a Citation or Decree, *viis & modis*, against the Party so to be cited, and the Party obtaining this Decree take Care that it be executed by a publick Edict, (although in the Parish Church where the Defendant inhabits) and then, upon a Certificate made of such Citation, the Party obtains an Excommunication against his Adversary: In this Case, here is just Cause and Reason why the Judge should absolve the Party so Excommunicate above, if he comes before the Judge, and alledgeth the Nullity and Injustness of the Excommunication, and makes it out like as before. Which if the Judge doth refuse, here lies just Cause of Appeal; and Mr. Clarke says, He has got Sentence in this Case before the Delegates. See more of this, where we speak of Appeals from Grievances. Now let's consider, Whether or no the Plaintiff can proceed in a Cause whilst the Defendant's Objection (against this unjust and irregular Certificate, and the unjust Excommunication) has Dependence? It seems he may: For although the Defendant were Excommunicate, (though never really cited) if he appears Personally, or by his Proctor, and do object against the Certificate, (as above) in order to obtain his Absolution; yet whilst the Term depends, which is assigned him to prove such his Objection, the Proctor of the Plaintiff may (if he will) proceed in the principal Cause in the Presence of the Defendant's Proctor, and may give a Libel as at other Times; the Reason is, because (by the most ancient Style of Courts, in order to avoid Multiplicity of Suits) limited Proxies (that is, to such a particular Effect only) are not admitted: But every Proctor that appears ought to exhibit a general Proxy in all Causes that are moved, or intended to be moved, that so at one and the same Time they may proceed as well

to the principal Cause, as also to the Objection made
inst the Certificate. But if the Defendant prove what
objects, he must have Charges as above, & sic è con-

. The Proctor of the Excommunicate Person appear-
ing, and having exhibited his Proxy for the Excommunicate
Person, he ought to swear that he believes his Client will
in the future obey the Law, and to stand to the just and
lawful Mandates of the Church. [I question whether or
this ought not rather to be done by the Parties them-
selves, for the doing it by another seems to be no more
than a bare Suggestion, against which the Provincial Con-
stitution has inserted a Caution. †] And further, the Pro-
ctor desiring his Client's Absolution, ought really to pay
the Proctor of the adverse Party, or to the Party him-
self, (if he be present) or he ought to deposite into the
Register's Hands the Contumacy * Fees (as they call
them) as they are taxed by the Judge. Which being
done, the Judge absolveth the Excommunicate Person,
and restores him to the Society of other faithful Christi-
ans; and, at the Proctor's Petition, orders that Letters of
reintegravit be made to the King's Majesty, in order to the
bringing the Body of the Excommunicate Person out of
Prison; and this Writ for his Liberty is to be granted and
directed in the same manner, as the other Writ was ob-
tained and directed for the carrying the Excommunicate
Person to Prison. But it is to be noted, That when the
Plaintiff's Proctor is not present to exhibit a Bill of Con-
tumacy † Fees, and to desire them to be taxed at the
time of the Absolution; the Defendant's Proctor (who de-
sires the Absolution) ought either to Swear, or give Bond,
to pay what other Charges are expended, by reason of his
Client's Contumacy, (besides those other Expences which
are abovesaid to be taxed by the Judge, and deposited in
the Register's Hands) and may be further taxed by the
Judge; so that if the adverse Party is informed afterwards
of more Charges due to the Client by reason of such Con-
tempt, and if it appear to the Judge, that there are more
Charges by reason of such Contempt than those formerly
taxed, they ought to be allowed, and placed to the first

† In this I re-
fer my self to
the experien-
ced Practitio-
ners, and to
the Justices,
who are bet-
ter able to
explain the
Provin. Const.
*Lind. de Im-
mun. Eccl. c.
Sec. Principes.
Sect. Suggesto.
usque ad finem
cap.*

* *Lind. ubi s.
gloss. super ver-
bo possunt. Sect.
Si vero aliquis
fit excommuni-
catus pro contu.
T. de don. gloss.
super verb. Abs.
Sect. Sed nunq.*

† *De hisce ex-
pensis plenius à
Lanfr. in prax.
not. de exp. n.
22, 23. ad fi-
nem. Alciat. de
expens. fol. 192.*

Taxation,

Taxation, and the adverse Party ought to be compelled the Payment of them, notwithstanding the former Taxation. The Reason of this is, because the Contumacy Fees are not certain, so that the Party to be absolved knows not what to depolite, neither knows the Judge what tax: For though it be certain, that the Excommunicate Person ought to pay Twopence for every Mile that his Habitation is distant from the Place of Judgment, or the Court he was to appear in; yet it is uncertain what Charge the Plaintiff may have been at in obtaining Writ in order for his Apprehension, before he could take the Excommunicate Person, and other Charges relating thereunto. For these Charges are all of them said to be Contumacy Fees, and by that Name are all of them to be placed and taxed.

4. And this last, (*Scilicet*) the Oath *de parendo Juri, &c.* and the Payment of Charges for Contumacy, and the like, is required of every Excommunicate Person; and it is the same Thing required of such as are only Contumacious for not appearing. * But there are other Things more required of Excommunicate Persons to be absolved, (in some Cases) which they must likewise perform before they have their Absolution. As if any is Excommunicate for not paying Charges of Suit, or the *Sortem principalem*, (that is, the Thing they are adjudged liable to by the Judge's Sentence, whether it be Legacies, Tithes, though perhaps wrongfully adjudged) they are not to be absolved until they depolite into the Court the Thing so adjudged; which (so soon as they prove is unjustly adjudged) is to be re-delivered to them again: In like manner, if the Excommunicate Person shall allege the Payment of this *Sortis principalis*, or Matter adjudged, he is to be absolved. The Reason is, because being admonished first to pay the same such a Day, and being cited to appear on another Day to shew Cause why he may not be Excommunicated for not paying the same; he ought to appear on the same Day, and to allege the Payment of it, and so purge his Contumacy. If Letters of Excommunication be taken out against him, being it may not be known that he has satisfied the Premises. Yet notwithstanding he be so Excommunicated,

* *Lind ubi f. gloss. upon the Word Possunt.*

, if he comes (and deposite the Sum or Matter adjudged as before) and proves, that he has already paid the same Sum adjudged, according to the Tenor of the sentence, the said Sum is not only to be re-delivered, and he to be absolved from the unjust Excommunication; but he must likewise have all such Charges allowed him, as he is put to in the proving this his Allegement.

CHAP. IV.

SECT. I.

The Manner of the Defendant's appearing by his Proctor.

The Proctor's Petition on behalf of his Client the Defendant, with the Manner of exhibiting his Proxy.

Having now supposed the Defendant capacitated to appear, and all Objections removed, and all Defects supplied on his behalf; we come now to shew the Manner of appearing, and then proceed to shew what Letts or Advantages may fall out on the Plaintiff's behalf; and how they must be redressed, so as both Parties may be capacitated to stand in Judgment. Therefore the Defendant's Proctor must exhibit his Proxy, and desire a Libel, or else desire his Client to be dismissed with Charges. Then the Plaintiff's Proctor must either give the Libel into Court, or else desire a Time, against which he may make a Libel, which the Judge agrees to, ordering a Time according to the Weightiness of the Matter. But before the Proctor of the Defendant ask a Libel, it is requisite that he consider the State and Condition of the Plaintiff, at whose Court his Client is convened; for if he chance to be such as is not the Power *tentandi Juris*, (by reason of his Age,

D

or

* *Nascitur enim*
Procuratoria
exceptio ex per-
sona constiuen-
ris Myns. Inst.
de except. Sect.
n. 4, 5. prae-
rea.

or some other civil Impediment, * as the following Chapter will manifest) the Defendant is not bound to stand convened at his Suit until those Impediments be removed, though all agree, that all Things, whatever done by the Plaintiff in such a State, are valid enough until his State be objected against: Therefore it is necessary that the Defendant do, in the first place, Object against his Adversary's Interest or Condition, which is the Thing falls next under our Consideration.

CHAP. V.

The Condition of the Plaintiff considered.

SECT. I.

A Minor being Plaintiff.

1. *Minors are said to be such, as have no Power of appearance or standing in Judgment.*
2. *The Manner of assigning Curators to carry on the Suit on each Minor's behalf, called Curatores ad litem; and this is done,*
 1. *By the Judge himself.*
 2. *By some Commissioner appointed to that Purpose by that Judge.*
 3. *By the Proctor constituted to that Purpose by the Minor.*
3. *The Form of drawing the Libel in this Case, and entering the Court Act after the Curator is assigned.*
4. *How the Proctor who is assigned Curator is to be secured, he be cast in Charges.*
5. *When and in what Case neither the Curator, nor the Liberator, are to be condemned in Charges, and when they are to be condemned in Charges.*
6. *How an Executor is freed from a Legacy by paying it to the Curator.*

(a) *L. 4. de in*
jus voc. l. 28.
ubi D.D. de jur.
de lib. C.

Minors are said to be such as are not capacitated, by reason of their tender Age, to stand in Judgment. By this Word, is sometimes meant one under Seven (a) Yet

Age, sometimes one under Fourteen. (b) Sometimes this Word is used to signify all Persons under Twenty five Years of Age; but by the Saxon Law, only those under twenty one (c). Those under Fourteen, by the Civil Law, are called *Impuberes*: Those under Twenty one, and above Fourteen, are called *Puberes*; and these are they who stand in need of Tutors, by whose Means they may be capacitated to maintain and vindicate their own Right. Dr. Zouch expresseth himself (d) thus, concerning these Sorts of Plaintiffs; *Nam sicut Pupillus*, (I imagine he means one under Fourteen Years of Age) *Tutore aut ore agere & convenire potest*; *ita adultus* [here he means one above Fourteen and under Twenty one] *Curatore consentiente litem intendere & exagere debet*.

(b) *Fott. & Inst. de tut. c. presentia Jac. Ayr. process. p. 1. c. 7. Obs. 1. n. 1.*

(c) *Bersichin. t. d. tut. 6. n. 2. Carpz. pr. q. 82. n. 23.*

(d) *Elem. Jur. p. 5. Sect. 2.*

2. If a Legacy is left to one who is under Seven Years of Age, then the Father, or next of Kindred to this Minor, shall go to the Judge, before whom he intends to promote the Cause for such Legacy, and shall alledge, That such an one deceased made his Will, wherein he constituted an Executor; and by that Will gave unto B—— his Son, a Minor, (that is, under Seven Years of Age) certain Legacies; and that, by reason of his Non-age, the said Minor is in a Capacity to act or stand in Judgment, in order to recovering of this Legacy: Wherefore he must implore the Judge his Office in this behalf, and desire that one or more Curators (e) may be assigned to the said Minor, in order to manage the Suit against such Executor for the said Legacy. Whereupon the Judge is wont to assign the said Father, or next of Kindred, and one or more of the Justices of the Court (jointly and severally) to be Curators *ad lites* (f) to the said Minor, though their own special Choice and Request at this Age is not required: But if the Minor is above Seven Years of Age, then he ought to appear personally before the Judge, and ought to alledge and request as above, or otherwise this Assignment of Curators avails not; but the Curator may be objected against, for not being a lawful Curator, or not lawfully appointed. When these Curators are appointed, 1. Either by the Judge himself, as above: Or, 2. By some Commissioner appointed

(e) *Specul. t. d. Synd. l. 1. par. 3.*

(f) *Mynst. Inst. T. de Cur. Sect. Item invit. ff. t. d. Curat. l. 45. c. Acta de te Jud. Mynst. i. Obs. 87. & 2. Obs. 31, 37, 38. Gail. 1 Obs. 96. n. 6. 167. n. 6. By what Names they are called.*

ed for that purpose; as if a Minor above Seven Years of Age dwells remote from the Court he su'd in, so that not without great Charges only, but also with the Hazard of the Minor's Life, he cannot conveniently appear at the Court. In this Case, the Judge (at the Desire of the Father, or next of Kindred to the Minor, alledging as above) is wont to grant a Commission to some Persons constituted in Ecclesiastical Dignity, and to the next of Kindred to the Minor, with intent to save Charges; or the Judge may grant his Authority to the Ordinary of the Place where the Minor dwells, (unless he be far distant from the Place of the Minor's Residence) to assign Curators to this Minor; and the said Minor shall appear before these Commissaries or Commissary, and shall alledge as before. Upon which Petition of the Minor's, the Commissary must assign him Curators in manner aforesaid, and then making Certificate of such Commission (taken out for this Assignment of Curators) to the Judge, who granted it; then the Curator must take forth a Citation (by the Name of Curator) against the Executor in a Cause of Subtraction of Legacies, &c.

3. Some of our late Civilians are of Opinion, That a Minor above Seven Years of Age may constitute a special Proctor to ask or request Curators to be assigned to the Minor, and this Proxy and Assignment of a Curator at the Proctor's Petition or Election, they say, is valid in Law. Mr. Clark says, It was controverted in a certain Cause of considerable Moment, whether or no this Proxy and Constitution of a Curator by the Proctor were valid in Law: Whereupon it was adjudged valid, and is frequently practised in the Cases; though formerly these Proxies, nor the Assignment of Curators by Vertue thereof, was of no Use, * nor admitted Practicable.

* Ratio est quia olim tenebant minor non potuit constituere procuratorem. *Alciat. pr. fol 52. Sect. quando contra procuratorem opinatur ratione constituentis.*

3. And now this sort of Plaintiff being fitted to write Law, you must consider the Manner and Form used in drawing his Libel or Declaration, whole *Exordium* or Preamble must contain these Words, *Pars probi viri N. Curatoris ad Lites M. minoris legitime Assignati*; (that is) the Part of the honest Man N. (for such are all Men presumed to be) Curator, assigned lawfully to manage the Suit

half of *M.* a Minor, saith, alledgeth, and in these Writings propoundeth, &c. and so on, as in all other Libels: And then, after the common and usual Articles inserted in the Libel in Causes of Legacies, this particular and special Article is to be inserted, (*viz.*) That the said *N.* was and is Curator *ad lites* to the said *M.* lawfully assigned and given, as appears by the Acts of Court, to which he refers himself to be particular in the Description of such Things are required in this Cause: You must observe, That the Name of the Curator, the Name of the Minor, and the Name of the Defendant, must be inserted (into the Act of Court, I guess *Mr. Clarke* means). And here let the Curator take notice, That although (as is abovesaid) the Assignment of Curators was done by Commissaries remote from the Place of Judgment, and that the Commission or Authority, by which they did it, were certified to the Judge who granted it; yet because this Commission was brought in, and exhibited in the Absence of the Defendant, he ought to take Care that he exhibit it again, (as a Supply of an assisting Proof to the Contents of the Libel) as well in the Presence of the Defendant, as also before the Cause be concluded.

Sometimes it happens, that where Causes of Legacy are instituted in the Curator's Name, Sentence is given against the Curator, 'especially if the Executor alledge and prove, That the Goods are insufficient to pay the Legacies: In which Case the Curator, (that is) the Proctor, and not the Pupil or Minor, is to be condemned in Charges. Therefore let the Proctor take care, that he have sufficient Security to bear him harmless from these Charges, lest he be condemned in them, and cast in the Cause: For though the Judge (as is said before) do assign the Father, or some near Kindred to the Minor, to be Curators with some Proctor of this Court; yet all Things are wont to be dispatch'd and done in the Name of the Proctor, and not the other Curator.

But if in case the Curator or Legatory prove, That the Deceased made a Will, in which is contained the Legacy

gacy they sue for; and that the Executor thereof has proved the said Will, but has not paid this Legacy, though demanded: And though the Executor (to avoid Charges might be run, in being condemned to the Payment of the said Legacy, by the Sentence of the Judge) do (before the beginning of the Suit) alledge, That he has fully Administered all and singular the Deceased's Goods in paying his Debts, the Funeral Expences, and other necessary Charges and thereupon does exhibit an Account of such his Administration, making thereby manifest, that the Deceased died so Indebted, as that there remained not Goods sufficient to pay the Legacy demanded; yet if the Curator or Legator upon this (having inspected this Account) do deliver from further Suit and Trouble, of compelling the Defendant to prove and justify this Account by Witnesses, they are to be dismiss'd without paying Charges; though this be the Stile and Custom of all Courts, yet see what the Law is in this Case. But it is otherwise, if after the Defendant exhibits this Account as before, and the Curator or Legator (not being satisfied therewith) do compel him to justify the same by Witnesses; which if he duly proves, then the Custom of the Court requires, That the said Curator or Legator should be condemned in Charges, because they might (upon Inspection into this Account) have been informed of the Truth thereof, by asking the Creditors named therein; if not immediately, yet by taking a Time to deliberate; and consult the Truth of the Matter, which is often wont to be given to such as ask it; and this is called *Dilatio dilatoria*.

* *Alciat. prax.*
* *dila.*

6. The Executor paying a Legacy (which is due to a Minor) to his lawful Curator, is freed from paying it again to the Minor when he comes of full Age, though the Curator never pay it to his Minor, having ('tis likely) laid out the same for him. The Reason why the Executor receives so good a Discharge, is because he did it by the Judge his Order and Decree; that is, because the Judge appointed this Curator to act and recover the said Legacy. The Judge therefore ought to be very Cautious whom he appoints to be Curator; but the Executor, (who is to pay

Legacy) that he might put the Matter out of dispute, (viz.) whether the Minor may recover the Legacy of him, or no, after he comes at Age, (notwithstanding he has left it to his Curator) it is not at all convenient for him to pay this Legacy, until the said Curator do commence suit against him for it, as Curator to the Minor; which action being instituted and begun, it is requisite that the Executor appear to the Action, and offer the Legacy in Court, and leave it *apud acta Judicis*, (that is, the Courts acknowledge and charge the Judge and the Register with the Receipt of it, which Acts the Executor ought to do, and ought to take a Copy of) and then the Executor is released, and the Judge is charged with it. In this case, the Judge ought not to deliver the said Legacy (so deposited) into the Curators Hands for the Minor's Use, unless sufficient Bond be entred for to bear the Judge and Executor harmless from the same, and also for the Payment of it to the Minor when he comes at Age. I might here have proceeded in such Method, as to have told of the Difference betwixt these Curators *ad lites*, and others enumerated by *Justinian* his *Institutes*, the *Codices*, the *Digests*, and the *Glossaries*, &c. but this would appear too great a Digression, and be very little useful in this Place. For your better Information therefore in these Differences, and their several Offices, I refer you to the Authors themselves.*

* *Myns. Inst. T. de Curat. Wasm. in ff. T. d.*

Pauli, l. 26. n. 9. Curator testamentar. non datur ibidem. Alciat. pr. f. 63. Sect. quibus

S E C T. 2.

The Plaintiff being such, as cannot give Security to prosecute the Suit, and pay the Charge if he be cast.

1. *Who this is whom the Law terms such, f. Pauper.*
2. *The Manner of Admittance in forma Pauperis, and the Oath the Adversary may enjoin him who is so admitted.*
3. *The Manner of assigning Advocates and Proctors to one so admitted.*
4. *The Manner of alledging and proving the Sufficiency of the Goods, so as to hinder this Admission.*
5. *The Manner of proving the contrary, in order to this Admission.*

1. **T**His State and Condition (*Scil.* labouring under a mean and indigent Estate) may be incident to either of the Parties in Suit, and the Premises may be equally objected against the Defendant, as well as the Plaintiff: In this Place we chiefly respect the State of the Plaintiff, who being such as cannot ('tis likely) give Security to pay the Charges of Suit, * if he be cast, he is called *Pauper*, a poor or indigent Person; nor is the Defendant bound to contest Suit with such an one, until he know how he shall be secured of his Charges. †

* *Alciat. prax. fol. 40. Specul. in C. de lit. conceff.*

† *Zouch. Elementa Jur.*

prud. 5. Sect. 8. Sect. Postquam Alciat. ubi f. 120. Sect. de Satisfaction.

* *Zouch. ubi f. Sect. Areo Alciat. ubi f.*

2. Now either of the Parties (as is said) may be admitted *in forma Pauperis* at any Time during the Dependence of the Suit; these Things being observed, and the Oath following being administred, (*Scil.*) That N. did appear Personally, and, in order to the Revocation of his Proxy, that he alledged himself not worth Five Pounds Debtless Goods, and that (upon this) he offered himself ready to take his Oath, and desired to be admitted *in forma Pauperis*; which Oath being administred, they are thence admitted by the Judge. Now, if the Adversary desire it, the Party so admitted is obliged to take his Oath, That he will pay the Charges (and the *sors principalis* *, that is, the Thing adjudged by the Sentence, if it be Tithes, Legacies, &c. that are sued for, and if it be the Defendant that takes

this

is Oath) if he be cast in the Suit, when he comes to a more plentiful Fortune or Condition. But this Admission does not extend to those Charges that are past, but only those which are to come, and to be expended in the Suit: Likewise, if the adverse Party will (before the said Oath is taken) offer and alledge himself ready to prove, That the Party so alledging Poverty is worth above five Pounds in his own proper Debtless Goods; he is not to be admitted, unless the Party, alledging this Sufficiency of the Goods, do make Default in the Proof of it. In the Inferiour Courts, to wit, in the Consistory of London, and the Courts of the Arch-deacons of London, Middlesex and Surry, which are kept in London or its Suburbs, the Party desiring to be admitted must swear, That he is not worth Forty Shillings Debtless Goods.

3. If any one being so admitted in *forma Pauperis*, do desire to have an Advocate and a Proctor assigned him, the Judge is wont immediately to assign them, who ought to give their Council freely, without any hope of receiving Fees: The Assignment likewise ought to be, if the other Party has fee'd Advocates and Proctors (and those the most Skillful and Prudent) in such a Number, as that there are none, or at least very few, left to manage the Cause on the Part of him so admitted; therefore the Judge (at the Petition of the Party alledging, and adding, That he is like to lose his Cause for the want of Advocates and Proctors) will assign to the said Party so alleging one or other of the Advocates, and one of the Proctors, (so fee'd by the other Party, as before) to whom he shall immediately give Fees (if he sues not in *forma Pauperis*). Likewise, if the Plaintiff be one of the Nobility, or some eminent Person, sometimes the Advocates or Proctors refuse to perform their Office against such Persons: In this Case, (this being alledged, and Oath being made by the Party, that he solicited such Advocates and Proctors, and offered them their Fees, and that they refused to take their Fees and to give Council) the Judge, at the Parties Petition, may assign these Advocates and Proctors, and admonish and compel them (under Penalty of Suspension from their Office) that they be in Council with the Party, who must

must also immediately give them their Fees. But in the
aforesaid Cases, it is lawful for any to have two Proctors
and three Advocates; and for a Noble-man and a Bishop
to have six Advocates and three Proctors, by the Statutes
and Stile of the Court of the Arches; by the which Sta-
tutes (unless where there is a manifest Defect of other Ad-
vocates and Proctors) the Judge ought not to assign any
of that Number, (so fee'd on behalf of the Noble-man, &c.)
at least if there remain three or four expert and learned
Advocates and Proctors (for the Party who makes this
Petition) to fee. And observe further, That though the
Party, who fee'd so many Advocates and Proctors, (as a-
bove) do get the Victory; yet the Judge, when he taxeth
the Bill of Charges, is not wont to allow Fees for all, but
only for two or three Advocates at the most, and so many
Proctors, because sometimes the Parties in contest, if they
were permitted, would retain a multitude of Advocates
and Proctors, on Purpose that the Adversary might be char-
ged with infinite Expences.

4. The Party alledging the Goods to be sufficient, (as was
aforesaid) ought to specify the said general Allegation on
this manner: Also, that N. had at such time as this Suit was
begun, and hath and possesseth at present (unless he made
some fraudulent Alienation of his Goods, &c. since the Suit
begun) in Household Goods, and other Furniture and Ne-
cessaries, besides Clothes, to the value of ten, eight, six or
five Pounds; and in other Goods (*viz.* Leases, Chattels,
&c.) to the value as above; or in immoveable Goods, to
the value of five, four, three, two, or one Pound of Eng-
lish Mony yearly (for Lands, to the value of twenty Shil-
lings *per Annum*, is better worth than five Pounds); and the
Party objecting this, may specify any other Goods, and
then alledge, That he is commonly taken and reputed for a
rich Man among his Neighbours, and those who know him;
however that he is accounted worth twenty, fifteen or five
Pounds at least in his own proper Goods. And this Alle-
gation, touching the Sufficiency of his Goods, being admis-
ted and proved, then the Party, so desiring to be admis-
ted in *forma Pauperis*, is to be rejected and condemned
in Charges, which are made in and about this Motion and
Proof.

roof. And it is to be observed, that a Clergy-man (who beneficed) having a Living of the yearly Value of five Pounds, is not to be admitted *in forma Pauperis*, unless he prove very great Indigence and Want. This Allegement now mention'd, may be urged by either Party (against his Adversary desiring so to be admitted) by way of Exceptions.

5. Now if the Party, desiring thus to be admitted *in forma Pauperis*, making Reply to the Allegation of his Adversary, do alledge and prove by Witnesses, That he goes back in the World, and that, if his Debts were paid, (which are considerable) he was not worth five Pounds; he may be admitted *in forma Pauperis*, and must have his Charges allowed which are past, or already expended. But he must take the Oath (as above), That he will pay the Charges taxed, and to be taxed, and the *sors principalis*, (if he be the Defendant) when he acquires a more plentiful Estate: but yet this Party, so to be admitted *in forma Pauperis*, ought not to have those Charges* he has been at, by reason of his Adversary's delaying the Proceedings about the disproving such Poverty; because if his Adversary proved him worth the Sum of five Pounds in Goods or Land (as above), and that he was commonly accounted a Man better worth than such a Sum in the Estimation of all Men, it may be presumed very probable, that the Party (so opposing this Admission *in forma Pauperis*) might be ignorant what Debts the other might owe: Therefore he, who alledgeth this Poverty, ought to alledge his Debts particularly, (*viz.*) What they are, and to whom he owes them; that so it may appear, whether the Debts exceed or fall short of the Value of the Goods. To this Replication, may also be added another Plea, called *Duplicatio*, by the other Party, (if need require) and so to a fourfold Plea, of which more particularly afterward. Now these Exceptions and Replications being thus given, the Judge ought to assign the Parties a Term to hear his Interlocutory Sentence † upon these Exceptions, Replications, &c. which being determined, then the Defendant is compelled to contest Suit, so as it also do *constare*, that his Adversary has *personam standi in Judicio*.

*See Mr. Clarke
his Practice,
tit. de modo probandi
insuffici-
entiam bonorum,
explain his
Contradi-
ction.

† *Alciat prax.*
f. 101. de Off.
Gud. in ord.
Sect. Decimo.

S E C T. 3.

An Excommunicate Person being Plaintiff.

1. *The Manner of objecting and proving the Plaintiff Excommunicate, so as nothing be decreed at his Petition.*
2. *Matters acted and managed by an Excommunicate Person before this his Condition is objected, are valid in Law.*

* *Zouch. Juris.*
prud. p. 5.
Seç. 2.

1. **A**N Excommunicate Person, is another sort of Person whom the Law allows not the Liberty of standing in Judgment: If therefore the Defendant do object, That the Plaintiff is an Excommunicate Person, and that he has not *personam standi in Judicio*; nothing ought to be decreed at his Petition: * Whereupon the Excommunication is to be proved, by exhibiting the Letters of Excommunication under the Judge his Seal forthwith, or at least it is to be proved within Eight Days after such Objection, and this is usually practised; and this Excommunication being proved, the Proceedings are to be stopt, so as nothing further be done at the Instance of this Excommunicate Person, until this Objection be removed, &c.

2. But yet if the Plaintiff (so Excommunicate) have dispatch'd many and sundry Acts in the Cause, (*viz.* If he has given his Libel, made his Adversary contest Suit, and also produced his Witnesses) before the Defendant proposed or objected this Excommunication, all Things so done by the Plaintiff are valid, but Things done after are null and void. But Mr. Clarke says, he has heard it was otherwise with the Defendant; who (though he were Excommunicate, yet) might propound and prove any Thing in order to his Defence.

S E C T. 4.

An Out-law'd Person being Plaintiff.

1. *What an Out-law'd Person is, or who is said to be such.*
2. *The Manner of staying the Proceedings, if an Out-law'd Person sue for any Thing.*

THe last sort of Plaintiffs (who have not Capacity to stand in Judgment) which we shall here take notice of, are those, whom the Law terms *Bannitti* or *Utle-ti*, and these are such as are declared in *Bannum*, seu *privationem*: For these not only cease to be free-born English Men, and are consequently deprived of all the Privileges they ought to possess, and challenge in a free State by the Laws of the Land; but also all the Laws of Humanity, the Exercise of all Offices, their Goods, and all Civil Commerce, which by the Law of Nations they ought otherwise to have: They are out of the Protection of the Law of the Land; they are accounted as Enemies to the State, fugitives and Rebels, and such whom none ought to receive into the City, House, or feed at their Table *.

* *Gail. 2. de pac. pub. c. 1. n. 20. & 5. seq.*

2. Now these are no more capable of standing in Judgment than Excommunicate Persons, neither ought any Thing to be decreed or granted at their Petition. † If therefore an Out-law'd Person, or his Proctor, make any Petition, the Proctor of the Adversary ought to object, that nothing ought to be granted upon such his Petition, in as much as he is Out-law'd: And that he may immediately prove it, he ought to exhibit and produce the King's Writ, by which he was so Out-law'd; and thereupon the Judge does usually Supercede further Proceedings in the Cause, as well on the Plaintiff's as the Defendant's Part; for in this Case, the Defendant is not obliged to make further Defence; neither does there need further Proof herein than the King's Writ, which is Proof sufficient of it self. I might here insert many more, who, by the Civil Law, have not a Capacity of standing in Judgment; but I refer you

† *Zouch. Jur. prud. sect. 2. p. 5. Sect. Ratione Delicti. Jacch. Blum. proc. Camer. T. 34. n. 198.*

* *Alciat. prax.*
 f. 38. *usque ad*
 fo. 46. 77. *Myns.*
Inst. d. excep.
Seff. p. atere.
 † *Myns. ibidem*
 T. 14. *Seff. 7.*
 n. 4, 5, 6. *ac*
per tot.

you to my Author, * where you may find them at large
 There may likewise Exceptions arise in respect of the Per
 son of the Plaintiff's Proctor, which are also at large recited
 by *Alciatus*, in his *Praxis utriusque Juris*; also in respect of
 the Action, &c. †

CHAP. VI.

*Other Objections to be made against the Plaintiff; in
 respect of,*

SECT. I.

His not appearing to prosecute the Cause on that
 Day, against which the Defendant was cited to
 appear.

1. *The Petition of the Defendant's Proctor in this Case, and
 the Order taken to compel him to appear and prosecute.*
2. *The Manner of dismissing the Defendant, with Charges, if
 the Plaintiff do not so appear.*
3. *The Manner of obtaining a Monition for the Payment of such
 Charges.*

1. **H**AVING considered the State of the Plaintiff, and those
 Objections which may arise in respect thereof; we
 come next to consider those Objections which may arise in
 respect of Accidents, as his not appearing to prosecute the
 Cause, &c. We have shewn, at *Chap. 4.* the Manner of
 the Defendant's appearing by his Proctor on the Day he
 was cited to appear in: Wherefore neither the Plaintiff, nor
 his Proctor, being present to give a Libel as is desired, the
 Defendant's Proctor must alledge, That his Client was cited
 to appear on that Day, at that Time, and in that Place, to
 answer *M.* in such a Cause, and that the said *M.* takes no
 Care to prosecute this Cause: Wherefore he must desire
 that he may be compelled, by a Summons, to prosecute this
 Cause against such a Day, under Penalty of having the De
 fendant

ndant finally dismissed, with Charges. Which the Judge accordingly orders, appointing a competent Time for his appearance, according to the Distance of his Habitation from the Place of Judgment.

2. If the Plaintiff appear not upon this Citation (being lawfully Executed and Certified, and he being Three times called in Court) on that Day in which he was cited to appear and prosecute his Cause, nor does any way prosecute, he is to be pronounced Contumacious; and in Penalty of such his Contumacy, the Defendant is to be dismissed, with Charges, which are to be taxed (without any Schedule) to the Sum of Four Nobles, according to the ancient Rule of all the Courts of the Archbishop of Canterbury, and Monition is thereupon to be decreed for the Payment of such Charges. [In the Courts of the Lord Archbishop of York, these Charges are seldom taxed to more than Eight Shillings where the Plaintiff doth not prosecute, &c. as I find it in several Causes of that Court, and especially *Lid- dard and Richardson* against *Caleb Stopard, Clarke, Termino Michaelis, 1665, Dr. Burwell* sitting as Judge.] Observe also, That if the Proctor of the Defendant do not appear, or make his Petition on the same Day he was cited to appear in, as aforesaid, yet ought the Plaintiff to be cited to prosecute his Cause thereon; * yet the Defendant may appear upon any other Day if he will, and may plead in general, That he was cited to appear, as above, in answer, &c. whom (seeing he prosecutes not this his Cause) he may desire may be admonish'd to prosecute the same, as above. Likewise if the Plaintiff do appear upon such Citation, and do prosecute his Cause, then he ought to pay no Charges, unless he be cast in the Suit. To observe, That in taxing of the Charges for not prosecuting the Cause, there ought no Oath to be taken (upon Taxing them) that they are really disburs'd, &c. But as Mr. Clarke adds in another Place, [*Titul. de dismissale actis reæ cum expensis si Acta non Libellaverit*] That [though it is commonly adjudged], the Taxation of Expences without the Party's Oath, or the Proctor's Oath, That his Client has really disbursed the Sum taxed, or which he desires

* *Alciat. f. 100.*
nihil compar.
sive Reus sive
Actor recedat
sine licentia
Judicis.

* In taxatione
expensarum
tria debent con-
currere.

1. *Judex debet
taxare eisdem.*

2. *Victor de-
bet jurare se il-
las fecisse.*

3. *Judex debet
de lato Jura-
mento ferre sen-
tentiam super
eisdem. Lant.
caput quoniam
de expen. n. 7.
Alciat. de ex-
pensis. Sect.
quando & qua-
liter exp. con-
demnatio sit fa-
cienda.*

desires may be taxed) to be null and void; and that there be an Appeal moved thereupon, the Appellant will get the Victory: [Yet in this Taxation of Expences for not Libelling, this Oath is not required:] Here he seems to make a Thing Practice and not a Practice at one and the same time. However, from this confused Order of Mr. Clarke's expressing himself, we may infer thus much, That these Charges ought not to be taxed without the Oath, That the Party has really disbursed * or expended the said Sum: And this (as I remember) I have heard has been practiced; but consult the *Practicos* Defendants.

3. A Taxation being made of the aforesaid Charges, the Defendant may desire the Plaintiff may be admonished to pay the said Charges taxed against some convenient Day or else that he appear on some Court-day, after the Day appointed for the Payment of the said Sum, and see him Excommunicate for such his Non-payment; which Petition the Judge does accordingly grant.

S E C T. 2.

His not taking Care to give in his Libel or Declaration at the Time which the Judge assigned for that Purpose.

1. *The Defendant's Petition for a Libel.*
2. *What Charge is due, if there be another Time assigned for a Libel.*
3. *The Manner of dismissing the Defendant, if no Libel be given in according to that second Assignment.*
4. *A Monition for Charges, as in the last Sect.*

1. **I**N the Fourth Chapter last foregoing, we shewed how the Defendant's Proctor might desire a Libel, or desire his Client to be dismissed; which he must request in like manner again, in that Day which the Plaintiff had assigned for that Purpose: At which Time, the Judge may, of his meer Pleasure

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ur, (or for some good Cause being alledged) assign
without any just Cause of Grievance) another Day to the
roctor of the Plaintiff, in which he may give in his Libel.
2. But in this Case, the Plaintiff ought to pay the De-
ndant Twelvence for retarding the Proceedings of that
ay. The Payment of this Twelvence, was wont former-
(by the Stile of the Court) to be duly observed; but
w for some Years past it was wont to be demanded by
Proctors: Whence it happens that many Proctors are
elefs to give in their Libels, and do sometimes prolong
Time from Day to Day, for Three Court-days at the
st, before they give in their Libel.

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Petition

3. Now if no Libel be given in at the Second Time ap-
ointed for this Purpose, the Judge (at the Petition of
Defendant's Proctor) ought to dismiss the Defendant
h Charges, which he ought to tax to Thirteen Shillings
Fourpence, according to the Custom of the Court, which
om is Warrant sufficient for the Taxation of that Sum:
omuch that neither the Defendant nor his Proctor are
ged to swear, whether the same were expended and
ourfed, or not; and therefore, in this Case, the said
Sum is due, whether more or less was disbursed and expen-
del.

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4. Upon this, a Monition is to be decreed, for the Pay-
ment of the said Charge, in Manner and Form as in the
going Paragraph.

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CHAP.

C H A P. VII.

Of Exceptions.

S E C T. I.

1. What they are.
2. How many Sorts of Exceptions.
3. In what part of the Proceedings they may be urged.
4. The Manner of the Defendants urging these Exceptions.

1. **I** Cannot much excuse this Method from being preposterous, seeing what is before precautioned, touching the State of the Plaintiff, might properly be reduced under this same Title of Exceptions. This Word *Exception*, taken in general, does signifie every Judicial Act or Defence whether propounded by the Plaintiff or the Defendant; but taken more particularly, it does signifie an excluding or delaying the Action (*a*) or Intention.

(a) Jac. Blum.

proc. Cam. tit. 69. n. 3. Alciat. de excep. Myns. Inst. de excep. in rub. n. 8, 9, 10, 11, 13. Panorm. in rub. d. excep. Lanfr. ibid.

(b) See Myns. T.

d. except. per tot. & præsertim. Sect. appellatur ff. l. 3. d. excep.

(c) Myns. ubi f.

Sect. præterea ex personæ s. dilatoria exceptiones qualis sunt procuratoria n. 1. 2. Inst. & n. 4. 5.

(d) Manuale jur. verb. sig. verb. exceptio.

2. Now there are many Sorts of Exceptions; (*b*) some are Peremptory (which are either simply such, or defensive); others are Dilatory, which defer the Cause; and these are also Twofold, (*Scil.*) *Dilatoria Solutionis*, (where perhaps the Party alledgeth the Payment or Satisfaction of what is sued for) and *Declinatoria Judicii*, which are Exceptions, in order to the declining the Cause. Now these arise from many Causes; (*c*) as by reason of the Judge, (who may be excepted against by Recusation, (*d*) Provocation, &c.) by reason of the Arbitrators, (whom in the following Sect.) by reason of the Plaintiff, (of whom we spoke fully in the Two foregoing Chapters) by reason of the Proctor, the Advocate, the Liberator, the Witnesses, the Interrogatories, publick Instrumental Positions, Sentence, &c. A Third Sort of Exceptions are called *Mediæ*, or Mixt. A Fourth Sort of Exceptions are

called *Anomalæ* (a) or Irregular, because they follow not (a) *Rosbach. prax. civil. tit. 42. per tot.*
 the Form of any other Exceptions: Of this Sort, is an Ex-
 ception against an Excommunication.

3. These Exceptions may be urged more properly in
 one part of the Proceedings, than in others. The peremp-
 tory Exceptions (which some call Perpetual) may be
 urged or propounded in any part of the Proceedings, be-
 fore it be concluded in the Cause. (b) The Dilatory (which (b) *Lanfr. d. except. n. 3.*
 some divide into Temporal, Personal and Real) ought to
 be propounded and urged before the Contestation of Suit,
 and these are they we have even now spoke of, touching the
 State of the Plaintiff, which are called by *Mynsing. Procura-*
te Exceptiones. (c) Of which, the Recusation of the (c) *Myns. Inst. d. excep. Sect. præterea n. 1. à per tot.*
 Party is another sort: Yet if in case the Party thus ex-
 cepting have not knowledge of these Dilatory Exceptions
viz. that his Adversary was Excommunicate, or a Minor,
 (d) until after the Suit be contested, then he may urge
 these Exceptions any time before it be concluded in the
 Cause, but none (d) after. The mixt Exceptions, in respect
 of their Circumstances, may be reduced to the Two former;
 therefore they may participate equally of their Privileges: (d) *Myns. ib. n. 5. W. semb. ff. i. h. n. 10.*
 so I understand *Alciatus*, in his *Juris utriusque praxi*
lib. de exceptionibus. Sect. Mediæ sive mixtæ, fol. 118. The
 Anomalæ Exceptions (which some divide into Favourables
 and *Odiosæ*) seem to me to be reducible to the former also,
 though they are said (*ex singulari quodam Jure*) to be pro-
 pounded and urged, as well after as before the Contesta-
 tion of Suit. (e) I do not intend in this place to speak of (e) *Rosbach. proc. tit. 43.*
 these Exceptions particularly one by one, only I shall hint
 at them, as they fall within the Order and Method of Pra-
 ctice. Some have already been discoursed of, as they came
 under their Order to be considered: Those which fall next
 under our Consideration, are such as arise in respect of the
 Cause. Wherefore the Defendant being satisfied, and ha-
 ving sufficiently urged those Impediments (f) on behalf of (f) *Vide Alci. at. prax. fo. 38. ad fo. 45.*
 his Adversary, (*viz.* the Dependence of a Suit betwixt
 him and another Court about the same Matter; the Fal-
 sity or Illegality of his Proxy, and such other Things as
 are even now mentioned in this Sect.) it is requisite

that he consider the State and Condition of the Judge, who is to judge betwixt them, (though this were more conveniently and orderly done, before he either except or accept the Person of his Adversary) *ut talis sit, qui recte interjudicet* : So that, if need be, he may use these following Exceptions of Recusation of the Judge, the Incompetency or Unfitness of the Court, &c. which he must do.

4. Under these following Protestations, (*Scil.*) of not consenting to the Judge of the Court, (as a competent Judge on his behalf) nor any way proroguing his Jurisdiction, further than he is bound by Law.

S E C T. 2.

The Manner of this Recusation, or Refusing the Judge.

1. *What it is.*

2. *In what manner it is done, and when.*

3. *Another (but not a proper) Sort of Recusation called Provocation; * in which consider,*

1. *What it is, and from whom, and to whom it is so provoked.*

2. *The Manner of expressing the Causes of it, with an Intimation to the Judge from whom it is provoked.*

3. *What the Judge (from whom &c.) must do, and how the Party provoking must prove this Provocation.*

* *Græce sumptus significat omnem app. tam Jud. quam extrajud. ex ωεε & ιγλέρω.*

1. **T**his sort of Exception, by way of Recusation, is a Refusing or Declining of the Jurisdiction or Audience either in respect of the Judge his Inability, (*a*) or for some Cause of Suspicion; as where any is convened before a Judge, whom he suspects (*b*) or thinks is not a Person indifferent in the Matter.

(*a*) *Zouch. Jur.*

p. 5. Sect. 4. ff.

d. jud. l. 12.

Sect. 2.

(*b*) *Spec. per*

tot. de recus. & verb. Procet. Sect. ult. Emer. pr. li. 4. n. 55. Gail. l. 1. obs. 33. Offici.

Episcopi recusatus causa ejusdem non coram arbitris sed coram Episc. c. 4. Sect. finem de deleg. n. 6.

2. *The*

2. The Defendant, who intends thus to Except, ought in the first place (before he contest Suit, (a) or accept a Li- (a) *Mynst. Inst. d. excep. Sect. prater ea n. 2. spec. ubi f. Sect. 3.* I think, nay before he admit or object against the Person of his Adversary, lest by admitting or accepting any Act he seem to approve his Jurisdiction) to draw his Recusation into Writing, specifying the Causes of it, (*viz.*) that the Judge is his Enemy, (the Causes of which Enmity ought to be inserted) or that he is nigh of Kindred to his Adversary, (b) or that some Suits do depend betwixt him and the Judge, (specifying the said Causes) and such like, (c) and in the conclusion of this matter of Recusation, he ought to refer the Causes of such Recusation to Arbitrators; (d) and then there ought immediately Two or Three (e) Honest Men to be named, on behalf of the Party so refusing, and the Judge likewise ought to name as many on his behalf; and these Arbitrators are made Judges, and shall judge concerning these Causes of Recusation; (f) and if they determine that the Causes of this Recusation are sufficient, then the Party so refusing ought to be dismiss'd from further observing the Judge so refused, or his Court: But if the Arbitrators determine the Contrary, (*viz.*) that the Causes of Recusation or Refusal are not sufficient, or at least not sufficiently proved; then the Party so refusing is to be referred to the Judge, who was thus refused. But enquire, who must be Judge (in this Case) in the Cause instituted. We say, the Arbitrators* of this Recusation; if so, then every by what Law they are made Judges, and whether the Judge thus refused, or some superior Judges, ought to give them this Authority of Proceeding in the Cause, determining it. But if the Judge, who is refused as we, does not likewise name Arbitrators on his Part, so (or at least before he make any Proceeding in the Cause) as the Defendant has given in his Recusatory

(b) *Si sit ultra tertium gradum non est justa Causa suspicion. Bouric. de Officio Advocati, c. 16. p. 46. l. 1.*

(c) *Specul. d. recus. Sect. 2. Marant. Specul. per tot. 6. d. app. n. 27. & deinceps.*

(d) *Hen. prax. f. 33. verb. Causa suspicionis & f. 38. Alciat. prax. fol. 117.*

(e) *Quis debet eos eligere vide Lanfranc. de recus. n. 11. 9.*

(f) *Alciat. ubi f. Lanfr. d. recus. n. 11. & num. 9. Sect. supra dicta forma recusandi Judicem suspect. per tot.*

* *Alciat. de recus. fo. 117. Sect. Duo principales. Specul. de recus. Sect. 5.*

Matter, and has named Arbitrators on his behalf, but does proceed in the Cause against the Defendant; all Things so done by the Judge (*a*) are Null, or at least Unjust; and the Party so refusing the Judge, may appeal upon such Actions or Matters so attempted (*b*) by the Judge refused, or he may complain of their Nullity to a superior Judge, and he shall obtain the Victory in such his Appeal or Complaint; notwithstanding, that these Things so attempted (if they had been done before the Judge was so refused) might probably have been Just, and no more than what the Law might require.

(a) *Myns. quoniam contra* 11.
de proba n. 58.
& sequen. Emer. tit. 4. n. 66. Innocen. Abbas. d. Jud. t. cum speciali de appel. Alex. consil. 89. vol. 1. cap. Tholos. decisio 479. verb. late.

(b) *Lancelot de attentat. part. 2. c. 6. p. 156. Baran. consil. 17. n. 1.*

(c) *Gail. l. 1. O. 2. n. 4.*

(d) *Panorm. e. cum sit Rom. 5. n. 21. de app. Specul. de app. l. 4. Sect. 2. precipue n. 4. 8. Gail. l. 1. Obj. 120.*

3. There is another Sort of Recusation, (though not so properly and perfectly such as the other) and this called Provocation, which some affirm to be an *Æquipollens* Term with the Word Appellation (*c*) or Appealing, though some say otherwise; (*Scil.*) that that is properly called Provocation, which is made out of Court, (*d*) the Cause not being begun: In which Case, it differs both from an Appeal, and a Recusation; as if any does suspect some Judge (*Scil.* the Ordinary of the Place where he lives) for some of the Causes mentioned in the foregoing Number, or for any other Causes whereby he may justly fear the said Judge doth intend to proceed against him in some Cause of Correction, or (if it be a Clergy-man) to put him to prove what Title he has to his Benefice; or in any other Cause whatsoever, which may probably be moved against him of the Judge his meer Office in this Case, the Party having such a Suspicion, may provoke from the Judge he so suspects, to a superior Judge, and may immediately submit and subject himself, his Name, Credit and Goods, to the Protection and Safeguard of that superior Judge. Now if in case this Provocation be made from any Bishop, his Official, Vicar-General, Commissary, (within the Province of *Canterbury* only sure) the Archbishop, or his Official of the Archdeacon, the Auditor of Causes, in the Court of Audience in *Canterbury*, is the superior Judge in this Case. But if you have this Cause of Provocation given by any other inferior Judge, (*viz.* an Archdeacon, or his Official) then you

may provoke to the Diocesan Bishop, or his principal Official. You may, if you will, provoke immediately (as above) from any Archdeacon, or his Official, to the Archbishop of *Canterbury*, or his aforesaid Courts, omitting the *dius terminus*, (the Bishop of the Diocese where the provoking lives, and his Official, &c.) for the Statutes of this Kingdom, set forth concerning the Manner and Form of Appeals, (a) have no Place in Provocations; (b) and if they have, yet the Prerogative of the Archbishop of *Canterbury* is reserved, as in Causes of Appeal. (c) 1. Now as in all Causes of Appeal from Grievances, it is usually held, that the Grievances ought to be particularly declared; so likewise, the Party provoking (d) ought to specify the Causes of such his Provocation, otherwise it avails nothing. The Party so provoking, ought likewise before he is cited to appear before the Ordinary of that place where he lives, either *ex officio*, or at the Instance of a Party) to intimate this his Provocation to the Judge from whom he so provokes, otherwise this Provocation will avail nothing; for if in case he be cited first, then is it a Recusation or a Refusing, (and not a Provocation) which ought to be done, as in the Second Number of this *Sect.* If, after this Provocation is intimated, the inferior Judge, from whom it is provoked, do make any Proceedings against the Party so provoking, they are all null, or at least unjust (like as in the Number foregoing, touching the Recusation); and observe, that the Party provoking may, for his greater Safety, or as a further Cautele, avail with the superior Judge, to whom he so provokes, that he write back to the inferior Judge, to acquaint him that he hath admitted this his Provocation; and he may likewise request the said Judge, to whom he provokes, to Decree (e) a Citation and an Inhibition, as in a Cause of Appeal. And though (as is said above) it is lawful to provoke, from an inferior to a superior Judge; yet see whether or no, in this following Case, the Provocation be of any validity or not. (*Scil.*) If the inferior Judge (before this Provocation be interposed in the manner aforesaid) do Decree the Party provoking, to be

(a) *Anno 24 H. 8. c. 12. Roll. verb. Appeals to Rome.*
 (b) *Panorm. d. c. Concil. Sect. d. ap. n. 5. & c. bona memor. 51. n. 8.*
 (c) *D. Stat. Anno 24 H. 8. c. 12. verb. sic, saving always the Prerog.*
 (d) *Berlachim, repert. verb. appellatio extra-judicialis versic. 4.*

(e) *Haud juri consentaneum nam in extra-judiciali appellatione nihil omnino decernend. Gail. l. 1. obs. 120. n. 5. Emeric. tit. 73. n. 9.*

cited to appear before him for any of the Causes afore-
 said, or do really cite him by a publick Edict, before this
 his Provocation is admitted by the superior Judge, and
 intimated to the inferior Judge. 2. Because in this Case
 the Recusation seems rather to have Place, and not the
 Provocation. In this Case, Mr. *Clarke* says, he has known,
 that (if the Citation of the inferior Judge were decreed
 in the Absence of the Party so provoking, and nothing
 were executed Personally upon him, before such his Pro-
 vocation was given in before, and admitted by, the supe-
 rior Judge) the Provocation avails as much, as if no Ci-
 tation had been decreed: And although the Party pro-
 voking were cited to appear before the Judge, from
 whom he so provokes, before this Provocation were in-
 timated to the said Judge; yet the Provocation is valid,
 and the Party provoking may appear on that Day, in
 which he ought of Right to have appeared upon the Ci-
 tation, and may intimate the said Provocation to the Judge
 from whom it is so provoked; who ought to supercede all
 further Proceeding in the Cause. 3. Upon this the Judge,
 from whom it is so provoked, may (by himself or his
 Proctor) appear before the Judge, to whom it is so pro-
 voked, and obtain a Decree to prosecute this Provoca-
 tion, as in a Cause of Appeal: And if the Party so provo-
 king, being lawfully cited, appear not to prosecute this
 his Provocation, the Cause, for which it was so provoked,
 is to be remitted, as in a Cause of Appeal, for not prose-
 cuting the Appeal, and the said Judge, from whom it was
 so provoked, may proceed against the Party, (so pro-
 voking) either of his meer Office, or at the Promotion
 of some assigned for that Purpose; or at the Instance of
 any other Person: But if the Party so cited do prosecute
 this his Cause of Provocation, he must give a Libel, and
 have a Time assigned to prove it, and if he do prove
 sufficient Cause of such his Provocation, (though proba-
 bly not all that are specified therein) the Judge ought to
 pronounce that he hath justly provoked, and that the
 Judge from whom he has so provoked, is no competent
 Judge (or rather no indifferent Judge) for him, and

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that he ought not to be convened before him; and the said Judge ought to be condemned in Charges made on the Part of the Party provoking, and that justly, in regard he could not but know the Justness of these Causes of such Provocation, as well by the Tenor of the Provocation it self, as the Tenor of the Libel touching the same; notwithstanding which, he yet stands in Contest. But if the Party provoking do fail in the Proof of his Libel, the Judge, from whom it was provoked, is to be absolved or dismiss'd, and the Party provoking is to be remitted to his Court or Jurisdiction, and is to be condemned in the whole Charge made on the Part of the said Judge, by reason of his unjust and causeless Vexation or Trouble.

I might next proceed in order to shew the Manner and Difference of Replications, being Things so subsequent to Exceptions. Let this only suffice to tell you, That Replication is no more than a Species, or kind of Exception, to which every Plaintiff has Recourse (if need be) against those unjust Exceptions his Adversary urgeth, which is also opposed by Duplication, and that again by Triplication, & sic usque ad quadruplicationem, and all of them in the same Order of the Proceedings as the Exceptions, that is, if the Exceptions be before or after the Contestation of Suit, these must be so too. I refer the Reader to my Authors themselves * to be fully satisfied of these Things, and the Order observed about them.

* *Mysf. Inst. d. excep. & Repl. ca. in rub. & text. n. 2. ante*

his cont. ultr. duplicas non licet progredi, sed post usque ad quadrup. Speculator. T. de replica-
2. *Joannes Andr. & Barr. in c. extra de excep. Alciatus d. Replicatione, l. 119.*

I shall now proceed to my proposed Method, which is, to shew the Order and Manner of Proceeding, (in Causes tried in these Courts) from the giving in of the Libel, even unto Sentence; and that first in Plenary Causes, and then in Summary Causes. Then I shall proceed to shew what particular Proceedings are more especially required in some Causes more than others, as in Causes of Appeal, Causes of Defamation, &c. Wherefore having supposed all the Three Persons, *Judicium constituentes*,

to be capacitated, so as to be termed *recte stantes in Judici-
cio*; it is now convenient that the Plaintiff shew forth his
Action by a Libel, that so the Defendant may deliberate
with himself, whether he will Contend or Submit; that
so, by knowing his Charge, he may know how to make De-
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THE THIRD PART.

CHAP. I.

The Manner of proceeding in Plenary Causes, from the first bringing or giving in of the LIBEL or Declaration, even until Sentence be given and executed.

SECT. I.

Of a LIBEL.

1. *What a LIBEL is.*
2. *How given into Court, and how admitted by the Judge; and how the Defendant is admonished to answer.*

I Shall not here trouble you with the several Species of Libels, nor the divers Acceptations and Definitions of them, nor their Structure, &c. seeing I have intended a more particular Discourse to that Purpose (*Deo favente.*) A Libel therefore (in short) is derived,

(a) *Wesemb. ff. de edend. n. 2.*

(b) *Hoftens. in rubric. d. Libelli obla. Sect. 1. n. 11. Specul. de liis contest. Sect. 1. Socin. eodem tit. in rub. Alciatus de Libelli obla. fol. 103.*

(c) *Alciat. d. Libelli ob. fol. 102.*

(d) *Alciat. ib. fol. 133. & 111.*

ved, *à Libro*, from a Book, whence formerly a Paper was usually drawn; (a) and in general, it signifies all manner of Writing: It is taken figuratively, as when the Matter is put for the Thing contained; but properly in this Argument, a Libel is taken for a Writing which containeth the Action. (b)

2. On that Day wherein the Libel is to be given into Court, the Plaintiff's Proctor ought to exhibit the same, and desire it may be admitted, and that the Defendant may be assigned to answer thereto, (at which Time he ought also to give (c) a Copy of his Libel to the Defendant's Proctor) whereupon the Judge admits the same, and repeats it in *vim positionum*, &c. and assigns the Defendant to answer to the same the Court-day following, and this is called *dilatio deliberatoria*, (d) being given the Defendant, with intent that he may consider whether he will submit, or contend. Now it often falls out, that there is occasion for the amending or altering of the Libel, which is to be done sometime before, sometimes after, the Suit is contested: Wherefore we will consider the respective Cases, in which and when these are permitted, before we come to the principal Part of the Proceedings, which is the contesting of Suit.

S E C T. 2.

Of the amending and changing, or altering Things contained in the Libel.

1. *What Emendation, or amending of a Libel is.*
2. *When, in what Cases, and how many Ways it is permitted, or not permitted.*
3. *The Manner of revoking or alledging an Error committed in the Libel, as to the Name or Sirname of either of the Parties, &c.*
4. *What Mutation, or altering a Libel is.*
5. *When, and in what Cases, it is or is not permitted.*

6. *When*

6. *When and what Charges the Party amending is liable to pay; also the Party not proving his contrary Matter, how liable to them.*

7. *When and what Sort of Security is required of the Parties in Suit, and to what Purpose, and whether only one or both of them.*

1. **T**His being a Matter of such considerable Moment and Intricacy, and so little understood by our ignorant Proctors of this Age, I will therefore insert so much out of *Mynsinger* * (touching this Point) as will serve to make these dull Souls (nay; those who are altogether unacquainted with these Proceedings) plainly to understand this Matter. *Emendatio*, or the amending of a Libel, is no more than the taking away or removing the Fault or Error, the Substance of the Libel remaining entire: So he who corrects or amends Things superfluous (by cutting them off), Things concise, or (not full enough by adding to them) Things imperfect (by supplying what wants), Things confused (by distinguishing them), Things obscure (by declaring them), he may be properly said to amend.

* *Inst. T. de Action. Sect. Si minus.*

2. Now when and how this Amendment is permitted, and when not, is the next Thing to be enquired: It is generally permitted before the contesting of Suit, but after the Suit is contested, it is only permitted in some particular Cases. First then, The Libel is amended, by declaring such Things are as obscure, as when the Plaintiff's Libel is obscure, incertain, general, confusedly, and preposterously drawn; in this Case, an Amendment or Declaration thereof is permitted, even until the Sentence, if the Defendant, who is conven'd, do not except † against its Incertitude, Obscurity, &c. But if he except against it, then it is only permitted to be amended before the Suit be contested, and not after; and in that Case, if it be not amended before, then are all the Proceedings null, (by reason of such Obscurity) and the Sentence is invalid. Whence *Speculator in tot. de lib. concep. Sect. ult. versic. cautus*, does caution the Proctors, That they do not desire the Obscurity of the Libel to be declared, but only that they

† *Gail. obs. 62. n. 11.*

barely

* What these Actions are, *Mynsing* tells in the 30th Sect. of this same Title de *Assi-*
on. at n. 22,

barely object, that the Libel is obscure and general, &c. which if the Plaintiff omit to amend, the Defendant may null the whole Process. Secondly, The Libel is amended when any Thing is added to it, and in this we must respect whether this Addition be made in Actions which are general, universal, or singular. * In universal Actions, it is tolerated to add any Thing to the Libel, even until the Sentence, *E. g.* where any one sues *pro Hereditate*, or his Inheritance, (we may by this understand all those who (having a Right to the Administration) do sue some temporary Administrators, who have got Goods of theirs into their Hands, either by a false and illegal Power, or otherwise, but I humbly submit this Distinction to the Learned) if they do express what Things or Goods did absolutely belong to the Estate they sue for; yet are they not prohibited, when ever they please (or find it out) to add what more comes to their Knowledge: For seeing it is controverted in general, that such an One has such a Right to such an Estate, (Inheritance or Administration) it seems to follow consequently, that he has not only asked or requested that particular Thing named in the Libel, but also what ever else might any way belong to that Estate he so sued for; therefore, in this Case, an Amendment ought not to be denied. The same may be said in general Actions, such as a Tutor or Curatorship, that is, where the Pupil commenceth such an Action against his Tutor or Curator, and expresseth in his Libel only some Things which were ill managed, wasted or concealed by his Tutor or Curator; yet may he add several other Things (until Sentence) as he finds them out, or that they come to his Knowledge: But how the Libel may be amended in a singular Action, is our next Enquiry. In this Case, we have a fourfold Consideration; for sometimes there is an Amendment to be made touching the Thing sued for; sometimes the Amendment respects the substantial Matters of the Libel; very often it respects the principal Qualities, and sometimes the adventitious Qualities. First, If the Amendment respect the Thing sued for, or ask'd, (*Scil*) because there is more due, perhaps, by Law than a Man doth sue for, or name in his Libel at first; the which Mistake he would rectify,

rectify,

rectify, by adding more to it afterwards; this, *Mynsinger* with, may be done both before and after the Suit is contested, even until Sentence, and this he proves to be the Sence of *Justinian* his Words, [*Si minus petitum sit, quam deberetur, sine, &c.*] from the Tenth Number to the end of the Sixteenth of this same Paragraph, where he very elegantly confutes the Opinions of *Accursius*, *Bartolius*, and others, who seem to put a different Interpretation upon his Text. Secondly, If the Amendment have relation to the substantial Matters of the Libel, it may without any hindrance be done before the Suit be contested, but not afterward: And this Opinion is generally received, as well in a Criminal as a Civil Cause. Now the substantial Parts of a Libel in a Criminal Cause, are said to be these, (*Scil.*) To name the Judge, to express the Month and the Place where the Crime was committed, &c. And being the Substance of the Libel consists in these, therefore they cannot be amended after the Suit is contested, at which Time the *Judicium* is said to be *Acceptum*) but the Defendant is to be released from this Accusation, *ipso jure postulate*, the Defendant urging this: Nay, the Judge may *ex Officio* reject the Libel, (which is so to be amended after the Suit is contested) though the Defendant urge not, seeing that in Criminal Causes, if it be omitted to name the Place and the Time, the Libel is null, *ipso jure*. In a Civil Cause, the substantial Part of the Libel consists in the Conclusion or Petition, seeing it is required that it flow rightly from the Premises, and that one Proposition do orderly cohere to another, as if any sues me for Land, (and in the Conclusion of his Libel, he adds his Reason why he asks it) because he is become one of *Cesar's* Household. This Conclusion is frivolous, and by this means the Libel would be void, whether the Defendant object against it or not; neither is any Amendment of it permitted after the Suit is contested, so that thereby the whole Process is voided, for the Libel ought to have the necessary, or (at least) presumptive * Conclusion. Thirdly, If the Amendment respect the Principal Qualities of the Libel, then is it only permitted, before the Suit is contested; E.g. if a Husband accuse his Wife of having com-

* *Langfranc. de petit. ib. n. 7.*

committed Adultery with *Titius*: This is the principal Quality in respect of the Fact. Wherefore if it should be amended after the Suit is contested, by saying, That the Adultery was committed with *Flaccus*, and so should name another Person; this Amendment would alter the Substance of the Fact, therefore it is not permitted. Fourthly, If the Amendment respect the adventitious Qualities, it is permitted even until the Sentence. These Qualities are such, as neither change nor vitiate the Libel, but are a kind of *Pleonasm*, as where a Time, Place, Day, Hour, or some other Circumstances of that Nature are added, which are not necessary; *E. g.* I demand Ten Pounds of *Titius*, which I lent him about Two Years ago, in the House of *Flaccus*: Now this is an adventitious Quality, in making mention of the Year and Place, for it is sufficient that it do *constare de mutuo*: And thus far of the Amendment of a Libel, by adding to it. The Third Part of Amendment of a Libel, is by detracting or deducing somewhat from it, as where any Sum or Quality is to be deducted from the Libel; as if the Plaintiff do at first demand Ten Pounds, and afterwards would only ask Five; or if he say at first, That the Party he sues, possesseth so many Goods of his, but afterwards he would but lay claim to a Part of them: In this Case, an Amendment is regularly granted, even until Sentence. But if the Party suing do require Bond of his Adversary after the Suit is contested, and would then detract from the Libel: In this Case, he shall not escape the Penalty of the Law, seeing this ought to have been done before the Suit was contested. In like manner, if any would detract from the Substantials, or principal Qualities, they ought to do it before the Suit is contested only, and not after; as if, in Criminal Actions, there is some Defect, as to the Month or Place; in Civil Actions, as to the Substance of the Fact. Lastly, Amendment of a Libel is permitted, when Things superfluous are cut off; and this is said to be lawful, even until Sentence. Those Things are said to be superfluous, which might be omitted in the Libel, without the least Injury; *E. g.* I lent *Titius* on the Calends of December a Silver Drinking Cup, when *Flaccus* and *Berta* contracted Matrimony, &c. this last is very superfluous.

erfluous, being nothing at all to the Purpose. Thus far of the Amending of Libels; if after the Amendment, or altering of a Libel, the Defendant is not instructed how to answer, *indulgenda est ei nova dilatio*, he ought to have another, or a longer Time assigned him, to deliberate whether he will answer negatively, or submit; but it is otherwise, if in case he know, or is informed beforehand, of the Matter which is to be added: But this Controversie is best decided by Custom, which is the chief Interpreter of the Law.

3. Now comes Mr. *Clarke* to shew the manner of rectifying this Error or Amendment. If (says he) an apparent Error be made in the Cause, as to the Name or surname of either of the Parties; or an Error be committed in any Computation, by writing an Hundred where twenty ought only to be writ: [This is the Third Sort of Amendment, which is made by Detraction, even now mentioned by *Mynsinger*:] Or if there is an Error committed in the Name of a Church, which is in contest betwixt the Clergy-men, (either for the sole Right thereof, or only for the particular Tithes belonging to it) or in any Thing else, so (as is aforesaid) that this Error do appear manifestly by the Proceedings themselves, and other Things done in the Cause; then the Proctor may alledge, That by the Mistake of the Writer of that his Libel, Allegation, or other Matter given in on behalf of his Client, the Name [*John*.], or the Word [*Rector*], (naming the Word or Sentence in which the Error is committed) is inserted, and writ in such Article or Position of the said Libel, Matter or Allegation, and in such a Line of the same; (computing from the Head or Foot of the said Allegation) whereas in very good Words, this Word or Name [*Thomas*], or that or these Words, ought of right to have been inserted; as is apparent in the Proceedings themselves, and the other judicial Acts done in the Cause (to which he must refer himself). Therefore he must revoke and subduct this Error, to all intents and Purposes in the Law, and desire that it may be accounted as revoked and subducted; and that instead of that Word or Name [*John*], or of the said Words, &c. that Word [*Thomas*.] or this Word [*Vicar*, &c.] may be inserted,

* It doth also respect the first Limitation to the second Rule (touching the changing of a Libel) hereafter inserted.

inserted, to which the Judge condescends, and orders so to be done. (An Error of this nature seemeth to respect the principal Qualities before spoke of by * *Mynsinger*). Though this Decree of the Judge, of revoking the Error, may and is wont to be interposed; yet the revocation or subducing of it by the Proctor alone is sufficient, if the Fault or Error do appear by the Proceedings to have been the Fault of the Writer: Thus far Mr. *Clarke*. Let's return again to *Mynsinger*.

4. We have now done with the amending of Libels; we now come to the other Part of *Mynsinger* his Purpose, (*Scil.*) the Mutation or Changing of Libels; *mutare Libellum*, to change the Libel, is to vary and alter the Substance of it, and (by leaving the old Action) to propound a new One, or omitting what was before repeated, to request somewhat else: To this, the *J. C.* add the accumulating of Actions, which is nothing else but the conjoining two several Actions in the same Libel, against one and the same Person.

5. Now when and in what Cases this is permitted, is our next enquiry: In which there are two Rules to be observ'd. 1. Before the Suit is contested, Mutation is regularly permitted; yet some Cases are excepted, in which neither that nor Amendment of the Libel is permitted. As First, Where any intend, under Colour of this, to revoke his or their Confession. Secondly, If he intends or strives to take away the Right he even now sues his Adversary for. Thirdly, If a Mutation or an Amendment has once been made already, or that there wants proper Seasons for such Mutation to be made, or else that for some Cause the same falls not within the Power of the Judge to permit it: As where a Civil Action being omitted, the Party thus changing his Libel, doth intend a Criminal or Detractionary Action. Fourthly, If the following Action be lost or taken away by Election; as because the Actions could not once be admitted, or else because they were contrary one to another. Fifthly, Where any intends a Mutation purposely to defer the former Action, or to renounce the sole Instance of that Cause; in these Cases, a Mutation is not permitted. But if any intends absolutely to remit back

the Suit and the Action, then they are to be heard. A Sixth Case, in which this changing of a Libel is not permitted, is in Criminal Causes, being forbid by the *Turpillian Ordinance*: As *Bartolius* treats in *L. quæsitum 5. F. ad Turpill.*

2. The other Rule is, That after the Suit is contested, a mutation or changing of the Libel is not permitted, because that whosoever contests Suit, is tied to that same Instance by his own proper Contract; yet this Rule is not always without Exception. First, Because there is sometimes, by way of Mistake, one Thing asked instead of another, or for some other Cause than of right it ought to be asked: For in this Case, it may be lawful (the Error being proved) to change the Libel after the Suit is contested in the same Instance. Secondly, The Rule takes no Place, when the Suit is not deferred by such Mutation, but is only made in order to avoid a Penalty, Thirdly, The Rule takes no Place, where the Parties do agree and consent to such Mutation, for the Judge ought to confirm this their Consent: There are many other Cases of the like Nature, which the Interpreters examine in their proper Places. *Mynsinger* comes next to speak of this Accumulating of Actions, which he says is regularly granted; for it ought not to be denied to any, to use all the Right they have on their Parts, so as that they do it not out of Fraud to the other Party; and when these are permitted, or are not permitted, he shews from the Thirty fourth Number, unto the End of this same sect.

6. Likewise, at Numb. 27. *Mynsinger* says, That in all the premises where the Plaintiff is permitted to amend or alter, he is bound to pay to the Defendant his Charges (which he calls *Indebitæ fatigationis*) for such unjust Delay: And of this Nature also seem to be those Charges, which Mr. *Clarke* treats of in his *Titul. de expensis retardati processus*, being due for all such Things or Matters as are given in on either Party to retard or delay the Proceedings. For if the Plaintiff or Defendant do propound any defensive Matter, as Allegation, Exceptions, or the like, and having them admitted, do obtain a Term Probatory, by which the Proceedings are retarded; (for this Delay depending, the adverse Party can ask nothing in order to bring the Cause

to a Conclusion.) If the Party propounding this defensive Matter do make Default in the Proof of it, the Term Probatory (assign'd for that purpose) being elapsed, the adverse Party may alledge, That N. has made Default in the Proof of the Allegation given in by him on such a Day, and that the Proceedings are retarded, referring himself to the Acts of Court, and desire the said Party to be condemned in Expences for so retarding the Proceedings, &c. And if this so appear to the Judge, he ought to condemn the Party in Charges, as is requested; and a Schedule of those Charges being given, he ought to tax the same, and decree a Monition for the Payment of them as above, like as in other Charges of Suit; Oath being likewise made, (as before) that he necessarily expended these Charges on this Occasion. No doubt but if this Petition, touching the Charges for such retarded Proceedings, were eagerly pursued in all Causes, Suits would be much shortned; for then the Parties in Contest would not dare to give so many frivolous and dilatory Allegations to protract Suits, as now they do. And this we may understand to take Place in all Things spoken of before, touching Exceptions, Replications, &c. when or in what part of the Suit soever they are given in.

7. Now in this part of the Suit it is, that the Parties, if Need require, do usually insist upon Security*: What this Security is, how defined, and how many Sorts of it, I refer the Reader to *Wesembecy*, *Alciat*, *Mynsinger*, upon Institutes. *T. de Satisfaction*. *Speculator*, *Bartolius*, and others, *T. eodem*. All of which agree, That not only one, but both the Parties ought to give Security: The Plaintiff † ought to give Security to the Defendant, that he will persevere in his Prosecution of the Suit, (either by himself or his Proctor) even to the End of the same; and this he ought to do before he offer the Libel of his Action, if the Defendant request it, but not else (a): And this he is obliged to do, either with Bondsmen, *vel per Cautionem Furatoriam*, by his Oath (b); nor is it the Plaintiff alone, but also his Proctor must give Security, if required (c). The Defendant, so soon as he receives the Libel, ought to give Security, either by his made Promise, Bond, or Oath, that he will

* *Zouch. Juris. prud. Elementa part. 5. Sect. 8. Sect. postquam parties in Jud.*

† *Myns. Inst. T. de Satisfd. Sect. Sed hodie n. 2. Wesemb. in ff. ib. n. 3. Alciat. ib. Spec. Sect. 1.*

(a) *Wesemb. ibid. n. 3.*

(b) *Myns. ubi f. n. 5. Alciat. ib.*

(c) *Myns. ibid. Sect. si autem. Wesemb. ubi f.*

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abide in Judgment until the Suit be determin'd *. Also it often falls out, that in this Part of the Suit, when the Cautions are entred on both Parts to the Effect aforesaid, the Defendant doth likewise intend some Action against the Plaintiff by way of Reconvention, in which Case Petitions are mutually made on both Parts †; of the which Proceeding, see *Alciat*.

* *Myns. ibid. Sect. Sed hodie n. 1. Wesemb. n. 2. Alciat ib. ff. qui Satisf. coguntur.*
† *Alciat. de Reconven.*

CHAP. II.

Of the Contestatio Litis, or the Contesting of Suit.

SECT. I.

1. *What it is.*
2. *When it ought to be done, and by whom.*
3. *How manifold this Contestation of Suit is.*
4. *The Manner and Form of contesting Suit, and by whom.*
5. *The Manner of getting a Decree for the principal Party to answer to the Libel; by whom it is obtained.*
6. *The Manner of obtaining a Term Probatory, and by whom.*
7. *What other Things are to be done at the Time the Suit is contested.*

WE have above, in the first Part of these Judiciary Proceedings, as also in the First Chapter of this Part, explained all such Things as are preparatory to Judgment. Wherefore we now come to the Second Part, * *in* * *Alciat. de lit. quia ipsa Judicia*, (that is) wherein the principal Causes are treated; and this is the *Contestatio Litis*, or the Contesting of Suit, which begins in the very *Exordium* of the Suit, and retains that Name and Order, even until the Sentence. Now this Contestation of Suit is defined the *Principium Formale* †, the Fundamental Judicial Act, where by the Judge begins to take Cognizance of the Cause, being

† *Spec. de fal. Sect. n. 10. & de sent. Sect. juxta num. 6. Myns. Obs. 74. Cent. 3. Obs. 26. made Cent. 4.*

(a) *Cujacius observ. lib. 9. c. 21. Socin. caput. unic. n. 7. de lit. cont. Chilia. in prac. c. 60 art. 14. lib. 3.*
 (b) *Alciat. de lit. contest. fol. 127. Sect. omnibus his expectatis.*
 (c) I refer the Reader to the Manual of the Law, *De verb. sig. the Word Lit.*, where he will find all those Divisions explained.

made by a Narration of the principal Business (on the Plaintiff's Part) propounded in Law, and by a Contradiction (a), or an objective Answer following it, on the part of the Defendant.

2. On that Day which is assigned the Defendant to answer to the Libel (b), the Plaintiff, or his Proctor, must, in Presence of the said Defendant, or his Proctor, request an Answer to the said Libel, according to the Judge's Assignment.

3. Now this Contestation of Suit is manifold; therefore, for the better illustrating its several Divisions, I shall add this following Analysis (c).

Contesting of Suit is Threefold, (to wit)

Affirmative.

Negative, which is Twofold,

{ General, (to wit) } which is either } Eventual,
 { Special. } made in express } Pure.
 { Words or Tacitly, }

Quasi contestata, or in a manner contested by the doing some Act, which is as valid as an express Contesting.

As where [in emergent Affairs, (before the Suit is contested) and in which it is not lawful to contest Suit expressly], the Suit is in a manner contested, and as it were contracted in Court, by the meer Interrogation and Answer betwixt the Parties. So likewise in Cases where the Contestation of Suit is not necessary, the Suit is said to be in a manner contested by the next Contradictory Act which concerns the Merits of the Cause (d).

(d) *Rosbach. procur. Civ. l. 49. n. 17.*

(e) *Cujac. obs. lib. 9. c. 21.*

* *Gail. obs. 62. n. 12, 13. ob. 66. n. 2. Specul. tit. de Libelli concept. Sect. ult. vers. Cantus.*

There are also Two other Divisions in respect of its Genius, or the Nature of it, being said to be either Civil (e) or Criminal.

4. We have said before, that this Suit may be contested either Affirmatively or Negatively, and this is to be done by the Defendant's Proctor on that Day which was assigned him to answer*. Wherefore if the Defendant is not minded to contest Suit Negatively, he may contest

the Libel and contest Suit (a) Affirmatively, and submit (a) *Umm. di-*
 himself to the Judge, and offer what Charges are to be *sputatio 13.*
 taxed; which often falls out in Causes of Defamation, *n. 53. Man.*
 and this is called a single or simple Confession. There is *Jur. verb. Con-*
 another sort of Confession, which is called a qualified Con- *fessio.*
 fession (b), when the Defendant doth indeed confess the (b) *Jacob. Blum.*
 Fact, but yet adds some certain Qualities or Circumstances *proc. Camer.*
 of this Fact, which are silently pass'd over by the Plaintiff: *t. 69. n. 54.*
 By reason of which Omission of the Circumstances of the *& seq.*
 Fact, it may be said to be different from the Fact pro-
 pounded in the Libel, and so consequently the Action insti-
 tuted is foolish, &c. Hence though the Defendant may
 not simply deny the Fact, yet he may do it indirectly,
 whilst he shews the Fact to be much otherwise than what
 is related by the Plaintiff. But if he intends to contest Suit
 Negatively, he must protest against the Generality, Inep-
 ititude, Obscurity (c), and undue Specification of the Libel, (c) *Formam*
 (to which his Answer is required) and with an intent of *habet à Jure*
 answering to the same, must object that the Matter speci- *ordinatam c.*
 fied therein are not true, as they are there related (d); and *de lit. cont. Barr.*
 therefore, that what is there requested, ought to be grant- *& Bald. hic*
 ed, *Animo contestandi Litem negativè*. Then the Plaintiff *tit. n. 4. Socin.*
 must alledge, That his Libel is in Articles; therefore he de- *d. c. n. 86. Ca-*
 sires the Judge may repeat it in full force of the Positions *strenf. conf. 401.*
 and Articles, which the Judge does accordingly, and ad- *n. 2. vol. 1.*
 mits it with a *Salvo Jure Impertinentium, & non admittendo-*
rum, &c.

(d) *Narrata*
prout narrati-
tur factum re-
spic. & petitæ
prout petuntur
ad jus pertinent
Wesemb. Cod.
lib. 3. T. de lit.
con. Alciat. de
lit. contest.

(e) *Zouch. Ele-*
menta Jur.
prud. part. 5.
sect. 9. Sect.
nam cum dif-
ficill.

5. Then the Libel being thus admitted, and the Suit
 contested, the Plaintiff must desire that an Answer may be
 given to the Positions of that his Libel by the Defendant
 and his Proctor; whereupon the Defendant's Proctor re-
 plies, That he does not believe the Positions to be true.
 Upon this the Plaintiff (protesting, that he thinks he may
 be better relieved by the Answers of the principal Party (or
 the Defendant) than of his Proctor (e) who manageth the
 Cause) desires that he may be decreed to be cited against
 some convenient Day, (according to the Distance of the
 Defendant's Habitation from the Place he is to appear at)
 to answer personally to the Positions of the said Libel, ei-
 ther before the Judge, or some Commissioners appointed

* *Alciat. de lit. contest. Sect. qualiter fiat litis contestatio n. 2.*

in his stead. Now this Decree for the principal Party to answer in every Cause, is wont to be requested, and asked by the Advocate * who is fee'd in the Cause, though in the Acts of the Courts it is for the most part inserted, that it is the Proctor who makes the Petition. And this was wont of old to be observed, that so it might appear to the Judge what Advocate was fee'd in the Cause; but this is now otherwise apparent, seeing no Libel ought to be admitted, unless it be subscribed by an Advocate. But observe this, That in Causes of Defamation, the Judge is not wont to decree that the principal Party be cited to appear, until after the Depositions of the Witnesses are published. But if it be decreed for the principal Party before the Publication of them, then this Clause is always added in the Acts, (*Scil.* so that this Decree for the principal Party be not taken forth, nor executed, before the Depositions of the Witnesses be published) because the Defendant is not bound to answer to any criminal Positions, except they be proved by the Witnesses.

† *Zouch. ubi f. Sect. cum vero confessio adversarii.*

* *Dilationes vero secundum locorum distantiam moderandae sunt. Zouch. ibidem & Sect. Et Judices Cod. de dila. c. quoniam Sect. quod ita.*

6. Then the Defendant's Proctor may dissent from the Premises, and (Mr. Clarke says he may: However, 'tis certain the Plaintiff's Proctor) may request a Term † to be assigned to prove the Libel; whereupon the Judge assigns him to prove it within three, four or more Court-days, according to the * distance of the Place where the Plaintiff lives, as above, and according to the Weightiness of the Cause. Now the Defendant may dissent from this, and if the Term given for Proof of the Libel be too long and incompetent, he may alledge it, and object against it: And as the Plaintiff (having too short a Term assigned him by the Judge for the Proof of his Libel, in respect of the Weightiness of his Cause) may appeal; so likewise, if too long a Term be assigned for the Proof of it, the Defendant may appeal if he dissents from such Assignment, but not otherwise.

7. You have now had an exact Account of this Contestation of Suit, before which the *Judicium* is not said to be *Acceptum*, or begun: The Effects of which contesting of Suit are many, (*Scil.*) the Proctor being made Lord of the Suit by it, and having Power to substitute, which he had

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had not before, and many other Things *. Now before we conclude this Chapter, there are several other Things to be considered, which ought to be done at such time as the Suit is contested, (in form as before) and those are the Manner of requesting the Proctor's Answer in Writing to the Libel: The Manner of administering the Oath of Contumacy. The Manner of getting the Citation, which was decreed, *pro parte principali*, &c. And of these, in several Sections, in their Orders.

De quibus vide Alciat. de lit. contest. Sect. quis sit. lit. contest. effect. Socin. n. 8. ut lite non cont. Myns. obs. 26. cent. 4. obs. 74. cent. 3. Spec. de lit. contest. Sect. 1.

SECT. 2.

The Manner of requesting the Proctor's Answer, with the Penalty to be inflicted on them, if they refuse to answer or contest Suit.

1. *The Reason why the Proctor's Answer may be requested, and when it may be requested.*
2. *What Remedy against the Proctor, who refuseth to answer to a Libel, or Contest Suit.*

NOW 'tis probable, the Proctor of the Defendant (being one who is sued in a Cause of Restitution of the Yoke of Wedlock, or of the late Divorce, or in a Cause of Separation, *a mensâ & thoro*, from Bed and Board) is so instructed by his Client, that he will confess the Solemnization of the Marriage alledged: In which Case, the Proctor of the Woman who sueth may immediately ask Charges of Suit, and Alimony, to be decreed to his Client; whereas, without the Proctor's Answer, he could not ask these, until the principal Party were examined, whose Answer is very often deferred in these Cases through the Contumacy of the Defendant, who endeavour to avoid being condemned in them. Wherefore, for this Reason, the Proctor of the Plaintiff, after the Suit is contested, (if he thinks that he can be relieved by the Answer of the adverse Proctor, upon any material Position of the Libel, and

and especially upon any position of a Matrimonial Libel, he may at the first (before it be decreed for the principal Party, or the Defendant) swear on his Client's behalf, that he believes the Contents of his Libel are faithfully propounded, and thereupon he may desire that the Proctor of the adverse Party may be admonished to swear to make a faithful Answer to the Positions of the said Libel, against the next Court-day, which is accordingly decreed.

* *Quid requiritur ut quis pro conf. pronun. vidi Lanfr. de respons. n. 2.*

2. Now if in case the Proctor being thus assigned to Answer the Libel, do refuse or delay the doing of it, or if he refuse to Contest Suit, (on this Day wherein it ought to be contested) either Negatively or Affirmatively, he is to be admonished to answer instantly, and if then he answer not, he is to be Excommunicate, and not to be pronounced *pro confesso*, as one confessing*; for this Pronunciation takes not Place, unless either the Party or the Proctor be sworn first to answer; it is so at least in Causes of Instance, though (says Mr. Clarke) I have known some who were accused of Heresie, who refusing to Answer to the Articles objected against them, were pronounced *pro confesso*. And observe further, that it must be proceeded against the Proctor refusing to answer, &c. in like manner as against the principal Party refusing, &c. of whom afterward.

S E C T. 3.

Of the Oath of Calumny.

1. *What it is, and in what part of the Proceedings Administred, and how many Sorts of it.*
2. *To whom Administred, and the Form of it.*
3. *The Penalty of those who refuse it.*

1. **I**N this part of the Proceedings also, the Oath of Calumny is wont to be Administred (*Scil.*) immediately after the Suit is Contested; nay in any other part of

the Proceedings, if it be omitted then, (a) and in some Cases before the Suit is Contested. Whence the Word Calumnia seems to have its *ἐννοια*, or true Signification, *Wesemb.* *Calumnia* shews at the first Number of the *Titul. de Furejuran-* *propter Calumniam.* Now this Oath of Calumny is dened, that whereby the Parties in Suit do protest their Conscience in the Prosecution of the Cause, (*Scil.*) that they do it not out of Fraud (b) or Vexation, &c. but out of Confidence they have of the Justness of their Cause. And of this Oath of Calumny, there are Two Sorts, (*Scil.*) the General, (which is not taken oftner than once in the Cause, and that immediately after the Suit is contested, or if omitted then) in any part of the Proceedings afterward) the other Special, which is likewise called the Oath of Malice, and may be administred to either of the Parties, as often as the Judge seeth fit (c), in any part of the Proceedings, either before or after the Suit is contested, and whether the general Oath be taken or not.

2. These Oaths are to be administred, not only to one, but to both or either of the Parties (d): And these Oaths *Mynsinger* proves (from *Cicero* his Oration *pro Roscio*) were usually administred to the Parties before *Justinian* his time; there is only this Difference betwixt them, that the One may be administred at any time when there is occasion, the Other only once. As to their Form, Authors prescribe one and the same in effect for both Parties (e). The General Oath of Calumny is usually administred in this, or the like Form: (*Scil.*)

(e) *Vide form. Juramentor. hujusmodi apud Rosbach. process. c. 50. n. 21. 2. c. 65. 74. Myns. ubi supr. Sect. 1. n. 4. 8. Alciat ubi s. de Jur. Calum. f. 130.*

You shall Swear, That you believe the Cause you move is just: That you will not deny any thing you believe is Truth, when you are asked of it: That you will not (to your Knowledge) use any false Proof: That you will not out of Fraud request any Delay, so as to protract the Suit: That you have not given or promised any thing, neither will give or promise any Thing, in order to obtain the Victory, except to such Persons, to whom the Laws and the Customs do permit. So help, &c.

Accor-

(a) *Wesemb. in C. de Jur. Jurand. propter Calum. n. 9. Alciatus de Juramento Calum. Sect. quando Jur. Myns. Inst. T. pena temere litigan. text. nunc ad mon. n. 8, 9. & in rub. n. 5.*
(b) *Wesemb. & Alciat. ubi supra & Myns. ubi supra in rub. n. 5. & super text. eod. n. 82.*
(c) *Myns. Inst. T. predict. Sect. eod. nunc ad monendi n. 10. 11. Gail. 1. obs. 87. Bachovius ad Tr. v. 1. Speculator. d. Jur. Calum. Sect. 1. vers. sed pone. Wesemb. ubi s. n. 4.*
(d) *Myns. ibid. & Sect. 1. seq. vers. Item Aetoris n. 7.*

Ordo Cameral. f. 130.

According to the Verse, thus:

*You this shall Swear, That this your Suit doth seem
Right, Just to be; at least in your Esteem.
That you (when ask'd) the Truth will not deny;
Nor Promise ought: Neither that knowingly
You any false Proofs will imploy,
Nor urge Delays, the Cause to 'noy.*

** Alciat. de
Jur. Cal. Sect.
de pœna nolent.
Myns. ubi f.
tit. pœna te-
mere litig. in
text. n. 7.
Zouch Elem.
Jur. pr. p. 5. f. 9.
Sect. ita Imp.
& Sect. si quis
vero litigan.*

3. Now if the Plaintiff refuse this Oath of Calumny, &c. he is to desist from further Prosecution of his Action. If the Defendant refuse it, then he is to be condemned, as one confessing the Articles laid against him. If these Oaths were duly administred, there would not be so many shameful Delays in the Causes as there are, seeing nothing is more ordinary in these Days, than for a Cause to depend (with the bear Affignation to give in an Answer, or to produce Witnesses, or to propound all Acts, &c. or to hear Sentence, or the like) for sometimes Three, Four, Five or Six Court-Days; nay sometimes for Two or Three Terms, putting it off with the same Dependance, from one Day to another, to the great Prejudice of the Parties, who complain exceedingly of these Abuses, pretending (justly) they never knew any End of their Business, after it comes into these Courts: Who gains by this, I wonder? 'Tis a Shame so regular a Practice should be abused by the Villany of a Company of time-serving ignorant Fellows, as are now adays; the only Men advanced to Employments.

S E C T. 4.

The Manner of getting the Citation under Seal, which was decreed against the Defendant, to make him to answer to the Libel.

What this Citation is, and how and why procured.

1. *What a Commission is.*

Before whom the Citation for this purpose is to appear, (Scil.) Whether the Judge himself, or some Commissioners assigned for that purpose: If before Commissioners, we must consider,

2. *Why granted, and the Manner and Form of it, and at whose Cost obtained.*

3. *In what Cases this Commission ought not to be granted.*

4. *The Proctors are to be admonish'd to be present at the Execution of this Commission.*

WE told you before, that upon the Decree for the principal Party to answer, a Citation to that purpose might be extracted: And this sort of Citation is called a Special Citation*, being directed only to one particular Act of the Proceedings. Now the Plaintiff must take Care, that so soon as is possible, after the Suit is contested, he procure the Answer of the adverse Party to the Positions of the Libel; that so his Intention being perhaps founded, or granted by the Answer of his Adversary, he may proceed to a Conclusion, and to Sentence in the Cause, without producing Witnesses; or if he be relieved by the Answer, in some one or more of the Articles, then he need not produce Witnesses upon the rest which are not confessed, and so ease his Client from the Trouble of proving those which are confess'd: Wherefore the Plaintiff (in order hereunto) ought to get this Decree or Citation against the principal

* *Wesemb. in Paratit. Cod. num. 5. littera B.*

principal Party, passed under the Judge his Seal, and executed as speedily as is possible, and certified and brought into Court on the Day he is to appear in as before.

2. This Citation or Decree for the Defendant to answer to the Libel, is either to make the Party appear at the ordinary and proper place of Judgment, there to be sworn, or else before Commissioners appointed by the Judge his Authority to swear the said Party, and take this Answer.

1. A Commissioner, or Commissary, is a Word of a very large Extent, signifying generally every one who receives a Mandate to dispatch Affairs or Business*. 2. Now the Judge is wont to grant a Commission (to Parties or Persons named to him) with intent to save Charges, and lessen the Expences (on the behalf of the Parties in Suit) to swear and examine the Defendant, or principal Party especially if the Defendant so to be sworn, do live in Parts remote from the Court, or Place of Judgment. And in this Case, there is seldom a particular Day appointed for the Party his Appearance, or any certain Place, but only in general, that he appear at any Time before such a Day (which is to be appointed by the Judge, according to the distance of his Habitation from the Place he is to appear at) to give his Answer, &c. before the Commissioners appointed for this purpose. And at the same time, wherein this Commission is obtained, to the Effect aforesaid, the Judge is also wont to assign the Commissioners a Day against which to transmit the Parties Answer, and certify what other Proceedings happen in and about the Premises; against which Day so assigned, or rather against the Day following (for if the Defendant do appear in any part of the Day, assigned for the transmitting of this Answer as aforesaid, he cannot be said to be Contumacious) the Plaintiff must take care, that the Certificate of the said Decree or Citation be continued, that so if the Defendant take not care to undergo his Examen, and transmit his Answer, then he may be Decreed Excommunicate. Now if the Person to give this Answer be a privileged Person, then the Commission is to be obtained at the mutual Expences of the Parties, (*Scil.*) the Plaintiff and the Defendant: But if the privileged Person be the Plaintiff,

* *Ruland. de commiss. lib. 1. c. 2. n. 7. Gail. 1. obj. 96. n. 2. Jacob. Blum. proc. Camer. tit. 73. par. 39.*

he who sueth, then he is to bear the Charge of this Commission, and not the Defendant, who receives the Benefit of it. [An improbable Consequence, methinks, for the Reason of it lies altogether hid from me; therefore I refer the Reader to Mr. Clarke his own Words (in his *Titulus sumptibus Commissio, pro parte principali sit concedenda*) make a better Construction of them.] But in these days, the Judge (without any Cause being alledged) is wont to grant a Commission, to examine the principal Party, or the Defendant, (though no privileged Person) if he request it: In which Case, the Party so desiring the Commission, is to bear the whole Charge in and about it.

In Matrimonial Causes, the Judge is not wont to decree any Commission for the Examination of the Defendants, or principal Parties; but is wont to compel them to appear, and stand Personally in Judgment, and undergo the Examen the Judge imposeth upon them; and that in such Cases where the Law provideth it, they may be sequestered, or separated into some Place apart, &c. 4. Likewise at the same Time of obtaining this Commission, the Proctors are both of them admonished to be Present before the Commissioners, at such Time and Place as the Commission is to be executed at.

Alciatus & Lanfranc. T. de positionibus, observe, that Positions are wont to be propounded in their Practise in this part of the Proceedings, (*that is*) immediately after the Death of Calumny: But this Practise seems to be Hyperbocal, as well as Obsolete. For whether you respect those Positions which are called Defensive, Peremptory, Exceptive, Elisive, Declaratory, Replicative, &c. you cannot but confess they seem to be included Properly in these, when and in what part of the Proceedings soever these are urged, whensoever we Except, then may we be said to propound Positions exceptive, &c. Now *Alciatus* intends them as Questions, particularising and specifying the Contents of the Libel more expressly: By reason whereof the Defendant (who would probably answer in such general Terms the obscure Libel, That he would not at all ease the Plaintiff from the Proof of ought) is now in such Labyrinth, as he must of Necessity (if he do answer so many several

* *Alciat. de Positione Scēt quid sit. Fol. 131.*

* Jacob Styrrer.
process. p 1. c. 4.
Obs. 7. n. 2. & 3.
Gail 1. Obs. 89.
n. 3. Rosbach.
proc. jur. tit. 51.
n. 2. De ver-
bor. sig. verbum
Articulus.

several and particular Questions) confess something, where-
by the Plaintiff may be eased in his Proof; and in this re-
spect, *Articulus & Positio* seem to differ little, and there-
fore at this Day they are * promiscuously taken the one
for the other, and good Reason it should: For if this be the
intent of these Positions, there cannot be any thing more
particular than a Libel in Articles. I confess my self an
absolute Stranger to this Piece of Practice, not remembering
that I ever observed any Positions of this Nature, which
Alciatus speaks of: Only Positions Additional I have known;
but these seem to respect the amending or mutation of the
Libel, and therefore are superfluous to be treated of apart
from that Act, or Manner of Practice: This is but my weak
Sense, and bare Reflections on them; I willingly submit
my self to the *Juris Tyrannibus*, to be better informed
herein.

C H A P. III.

Of the Personal Answer of the Defendant.

S E C T. I.

1. *What an Answer is.*
2. *How many Ways an Answer may be understood and taken, and the Reason of such Diversity.*
3. *How the Citation or Decree for the principal Party must be brought into Court.*
4. *What Remedy against the Party, if he does not appear upon that Citation.*

1. **B**Efore we rush into the Throng, it is very requisite we trace the Subject Matter of this Chapter from the beginning, and explain what it is first, and the several Orders and Structures of it. An Answer therefore (which

here meant of) is an assevering * of a Position, consisting * *Ummin. disp. 15. n. 20.*
 of Affirmation, or Negation. Or an Answer is a Confession, made (to the Position or Articles of a Libel) by the Words
 I doth, or doth not believe, † &c.

2. Now these Answers may be diversly made, and as diversly construed, (*Scil.*)

† *Gail. 1. obs. 92.*
Myns. 5. obs. 86.
Rosbach. præc. civil. tit. 5. n. 1.

┌ Categorical or simple Entunciation or Speech.

└ Hypothetical or compound Speech.

└ Modal Speech.

Answers may be diversly made, and as diversly construed, in respect of some

Quality, by reason whereof they are either	┌ Affirming	or	┌ Finitely	or	┌ Infinitely.
	└ False.	└ Equipollent Term.			

For Example: A Categorical Answer is said to be that, in which the Subject and the Predicate have their principal Parts: So that to answer Categorically, is nothing else than to answer after the same manner as the Question was propounded: As suppose this were the Position or Article to be answered to; (*Scil.*) I propound that *Titius* did freely ratify and confirm that Will, whereby he is prohibited from being Executor: To which Position *Titius* gives this Categorical Answer, either simply and absolutely, (I believe, or I do not believe, that I confirmed that Will, &c.) or adding this Quality, (I do not believe that I did it freely.) In this you see, the Answer is made after the same manner as the Position was propounded. But when *Titius* answereth thus to the Position, (*Scil.* If I did confirm that Will, I was ignorant that there was any law-

* *Manual. Jur.*
de verb. signif.
vide verbum
Responsio.

ful Prohibition contained therein; or if I did confirm it, then I was compelled to it, &c.) this sort of Answer is called an Hypothetical Answer. * Likewise, if *Titius* Answers thus, ('Tis possible I might confirm that Will, &c. or I was necessarily compelled so to confirm it,) this sort of Speech is said to be a Modal Answer. Also Answers may be finitely affirming, or infinitely denying, which happens no otherwise than by placing the Note of Negation; and though this Nicety is not always worth the taking notice of, yet sometimes it may so fall out, that the Party who gives the Answer, may be in danger of being perjured by the Mistake of those who draw the Answer, not observing to place the Note of Negation aright, by Means whereof they may at least alter the Intent of the Party who is to answer. As suppose a Position or Article is put thus, (*Scil.* That the Testator was in so good Health of Body at the Time of making the Will, that he was able to write over his Will himself, and seal it, &c.) Now the Defendant being to answer to this Article Negatively, answereth thus, [*Credo defunctum potuit non scribere Testamentum, &c.*] which is an Affirmative Speech instead of a Negative, and implies no more than that the Deceased was able to let alone the Writing and Sealing of his Will; whereas the Party answering intended to deny absolutely, that he had the least Ability to write his Will, as is alledged; which had been so to be understood, had the Particle *Non* been placed before *Potuit*, and what ill Effect a Mistake of this Nature (either in the Personal Answer, or the Proofs) would have, if committed, may appear to any. I know the Proctors will Cavil at these Criticisms; for, say they, none are so dull, but may perceive a Difference betwixt these Ways and Manners of Speech. I grant, [*Sirs*] ye may perceive a Difference: But I question very much, whether or no you can give a Reason for such a Difference? What Effect these Niceties may have (in Law) upon any of these Proceedings, I refer to the Judgment of the Learned: But that all Answers and Proofs do consist of some of these, may not (I hope) be denied.

3. The Decree or Citation for the principal Party to answer, is to be brought into Court (as other Citations are) on that Day ordered for his Appearance, with a Certificate indorsed upon it, like as other Citations have.

4. And if the Party appear not, then the Proctor of the Plaintiff ought to accuse his Contumacy, and desire that he may be decreed Excommunicate in like manner, as is spoke at the beginning of the Treatise, in the Chapter of Excommunications, &c.

S E C T. 2.

The Manner of Producing, Swearing and Examining the principal Party before the Judge.

1. *How the Defendant is produced.*
2. *How Sworn, and the Protestation of his Proctor at the Time of his being Sworn.*
3. *What Penalty, if he undergoes not his Examination (after he is Sworn) within the Time limited for that Purpose.*

IF the principal Party, or the Defendant, be present in Court before the Judge, the Plaintiff is wont to acquaint the Judge to this Purpose; (*Scil.*) That he there produceth the Defendant, whom he desires may be Sworn to make a faithful Answer to the Positions of the Libel given in on his Part.

2. Then the Judge having ordered the Defendant to lay his Hand upon the Book, administheth an Oath to this Effect: *You shall Swear, That (having removed and laid aside all manner of Affection, which you any way bear to your own Cause) you will faithfully and truly Answer to the Positions of the Libel, given into this Court against you, by such a one, in such a Cause; touching your Knowledge in such Things as concerning your own proper Fact, and touching your Credulity in such Things as concerning the Fact of some else: So help you God, &c.* Upon which the Defendant must kiss the Book, in Testimony that he

G 2 *sweareth.*

swearth. Now the Defendants are sometimes produced to answer to criminal and captious Positions, which he ought not by Law to answer to, as falls out in Causes of Defamation, Correction, Perjury, &c. Wherefore it is necessary in these and the like Cases, that the Party, or his Proctor, do (at the Time this Oath is administered) protest in the Presence of their Adversary, or his Proctor, That they do not intend to answer to any criminal or captious Positions: Or if it happen they are requested to answer to any such Position, then this their Answer to be accounted Null, and as though they had not been made. If the Protestation be omitted in these Cases, then the Party answering loseth the Benefit of the Law, which he might otherwise have.

3. This Oath being taken, the Plaintiff ought to request the Judge to admonish the Party to undergo his Examination upon the Positions of this his Libel against the next Court-day, or else that he appear then, and see himself Excommunicate for that his Contumacy, in not being so examined: And if the Defendant, being so admonished, do not take care to be examined against that Day, nor doth appear then to alledge some reasonable Causes, in order to excuse such his Contempt; this his Contumacy is to be accused, and in Penalty thereof he is to be Excommunicated as above. And if he stands Excommunicate Forty Days after the same is denounced, then this Denunciation is to be certified, and he to be signified to the King's Majesty, and the Writ for taking his Body is to be obtained against him, and he to be kept in Prison until he be examined, and satisfy the Church for this his Contempt, and pay Contumacy Fees. But if the Party or his Proctor (on that Day which was so assigned for his Appearance to see himself Excommunicate for not being examined) do alledge sufficient Causes why he was not examined; (*Scilicet*) because the Register, when he requested him to examine him, was not at leisure, [they seldom draw the Answers, but the Proctors of the Defendants themselves do it] or any other lawful Cause: Then the Penalty of this his Contempt is reserved until the next Court-day, or rather (*scilicet*)

ing in that Case he cannot be justly said to be contumacious) he is to be admonished again as above to undergo his Examination, if he be present in Court; and if not, then the Cause is to be continued in its former State until the next Court-day: So that if the Defendant is not examined before this Prorogation approach, he is then to be Excommunicate,

S E C T. 3.

The Manner of producing the Defendant before Commissioners assigned to take the Answer.

1. *The Manner of presenting the Commission, and how accepted of by the Commissioners, and how executed.*
2. *How the Execution of it is to be certified to the Judge who grants it.*
3. *The Manner of alledging the Contempt of the Commissioners, in not transmitting the Proceedings upon the Commission.*

IN the last Paragraph of the foregoing Chapter, we shewed you, That the Decree or Citation for the principal Party, as aforesaid, is to appear either before the Judge or Commissioners appointed for that purpose; before whom also the Proctors are admonished to appear at the same time. Which Commission is to be presented to the Commissioners, and accepted of by them, in like manner as the Commission for examining Witnesses (of which in the following Chapter) is presented and accepted. Upon which they are to proceed in all Things, in the same manner as if the principal Party were produced before the Judge, (whereof we spoke in the foregoing *Sett.*) the like Oath being to be administered, and the like Protestation being made by the Proctor as was there spoke of.

2. The Commission being executed, a Certificate is to be made thereof, after the same manner as the Commission for examining the Witnesses is to be certified, *mutatis mutandis*; of the which, see in the following Chapter.

3. To the same Place also we must refer you, to inform your selves the Manner of alledging the Commissioners Contempt, &c. and the Way of proceeding against them for such Contempt, therefore Repetition is needless.

S E C T. 4.

The Defendant refusing the Oath to answer to the Libel.

1. *What Remedy in this Case.*

IF the Defendant refuse to take the Oath, to answer to the Positions of the Libel, or to any other Matter, to which he ought by Law to answer; or doth pretend any frivolous Causes why he ought not to take it; he is not to be pronounced *pro confesso*, as confessing the Matter, though he have been often admonished, and commanded to take the Oath; but he is to be denounced Excommunicate, and is thereupon to be signified to the King's Majesty, and to be imprisoned, and there detained, until he take the Oath.

S E C T. 5.

The Defendant not answering fully to the Positions of the Libel.

1. *The Petition of the Proctor of the Plaintiff.*

2. *What Remedy against the Defendant in this Case.*

THE Defendant being Sworn, and having given his Answer, but not a satisfactory One; the Proctor of the Plaintiff may alledge, That the Defendant hath not answered fully to such a Position or Positions, referring himself to the Answer, and to the said Positions, as also to the Law in that Case; wherefore he must desire, That the Defendant

fendant may be called against such a Day to answer fully to the said Positions.

2. Upon which, the Judge [informing himself in the Matter, and being satisfied (by comparing the Answer with the Libel there in Court) that the Defendant has not fully answered], may Decree the Defendant to be called according as is desired, or else he may assign to hear what the Defendant hath to say in Excuse of his not answering fully against the next Court-day; and then (Informations being had with Counsel as to the Law, and the Matter of Fact in this Case) the Judge may either grant or reject the Petition made by the Plaintiff; and if he Decree, that a fuller Answer ought to be made, then a Day is to be appointed for this purpose, and a Citation to be decreed against him, to appear and see himself Excommunicate, if in case he answereth not against that Day so appointed for a fuller Answer: And if he do not answer fully before that Day, nor appear on the Day which was appointed for his Appearance as aforesaid, then he is to be Excommunicate; and if (being so cited) he do appear, but alledgeth no sufficient Cause why he did not answer, he is not to be sworn to answer *de novo*, but is to be admonished, and compelled to answer fully as above, (by Vertue of the Oath he has already taken) before the next Court-day, upon the Pain of being declared *Pro Confesso*, or one confessing the Articles or Libel laid against him; or else to appear against that Time, and see himself declared and pronounced as such. At which Time, if he appear, the Proctor of the Plaintiff is to request, That he may be admonished to give a full Answer immediately, under Penalty of being declared *Pro Confesso*, * as before: Which being granted by the Judge, if the Party doth not then accordingly Answer; The Judge saith on this manner, (Scil.) Because N. being present in Court, and being asked, commanded, and admonished, to give a full Answer, hath refused so to do; therefore we pronounce him Contumacious, and in Penalty of this his Contempt (at the Petition of M.)

quibus non habetur pro confesso, licet non respondet. Generaliter vero hac Reg. procedit. qui tacet non utique fatetur sed tamen verum est eum non negare. Adde Alciatum de

** Quæ requiruntur ut quis pro confesso pronuncietur, vel non; vide Lanf. de Respons. n. 2. 16. ac per tot. ubi plures ponuntur casus Reg. procedit.*

* This is called a presumptive Confession, *Vid. Manual Jur. de verb. signif. verb. confessio.*

we declare him pro Confesso, or as one confessing or granting those Things, which he refuseth to answer fully to. * But it is more safe, that the Judge do not pronounce him *pro Confesso* in such general Terms, but rather more particularly, for not answering fully to such an Article, or such an Part of an Article.

S E C T. 6.

The Defendant, or his Proctor, confessing or answering too much to the Libel, or other Matter,

1. *The Manner of the Defendant's or his Proctor's Petition, in order to the revoking this Confession, and when this Revocation is permitted.*
2. *The principal Party may be convict of Perjury.*

* An erroneous Confession being made by the Proctor, or the principal Party himself, does prejudice the Party, unless the Error be proved and revoked, which may be done at any time before Sentence.

Alciat. de confession. Sect. Quando & que confessio revocari possit. C. de confess. l. unica extra eodem c. 2. de hac materia etiam Laufr. plenius tractat. de Conf.

1. **I**F the principal Party do confess any Thing in his personal Answers through Mistake, * he ought to appear personally before the Judge, and revoke this Error; for the Proctor by a general Proxy, *ad lites*, hath no special Mandate to revoke this Error; but the Defendant may grant a special Proxy (to his Proctor) to this purpose. Which said Party, or his Proctor, may appear before the Judge, (in the Presence of the adverse Proctor) and declare, That they do then and there subduct and revoke their own Confession or Answer, made (on such a Day) to such an Article of the Libel or Matter, &c. and that they do desire this their Answer may be accounted as subducted and revoked to all Intents and Purposes in the Law. And then making the Error manifest, and that it is much different from the Matter of Truth, they must alledge, That this their Confession or Answer escaped from them through a manifest Error, and that the Truth of the Matter is much otherwise. E. g. in the personal Answers aforesaid, it is answered, That he believed M. had been Farmer of the Rectory (where the Tithes sued for were due) in the Years and Months mentioned in the Libel, or in such a Year; Whereas in

num. 3. 19, 21, 24. & praesertim in num. 33. sicut in c. Quoniam n. 18.

very

ry deed, he was not at that Time Farmer of the said Rectory, having sold or alienated all his Right, Title and Interest, in and to the Tithes aforesaid, (upon such a Day, such a Month and Year, before the Time mentioned in the Libel) to one D. by reason whereof the said D. (and not M. mentioned so by Mistake in the Answer) was the real Farmer of the said Rectory, and all manner of Tithes whatsoever, belonging to the same, in those Years libelled: Which Thing being unknown to the Respondent at the Time of giving his Answer, therefore the said Confession was Erroneous, and a perfect Mistake; or if, in the Personal Answer, there is a Confession of Eight Acres of Barley, when in very deed there was but Four, or perhaps no Barley at all. Now if this Error be proved such by sufficient Proofs, or by the Confession of the adverse Party; then the Defendant or his Proctor may revoke these erroneous Confessions by the Judge his Decree, and not otherwise, if the said Answers were not accepted of by the adverse Party before they were revok'd. But I think (saith Mr. Clarke) that even in this Case, where the Answers are accepted, this Revocation avails, though the Judge do not interpose his Decree, because seeing the Matter and the Truth is prov'd to be otherwise, the adverse Party cannot take any Advantage by the said erroneous Confession, though he has already accepted it; and this Revocation may be made any time before Sentence, saith *Alciatus*, in the Place last quoted.

2. That the Defendant may be convict of Perjury, is not at all to be doubted; touching which Matter, mention is before made, where it is shewn, what Causes the Ecclesiastical Courts take Cognizance of; and for the better Discerning how and when any one may be understood to be perjured, we may not unfitly appropriate to this Place what *Lanfranc* says, *de Testibus**, to which Place I refer the Reader.

* *De Test. de position. n. 74.*

S E C T. 7.

Satisfaction being made, as to the Answer of the Defendant; Letters Compulsaries are to be obtained, to compel Witnesses to come against the Term-Probatory.

1. *What these Letters Compulsaries are, and why obtained.*
2. *When and how obtained.*
3. *Before whom these do compel the Witnesses to appear.*

1. **T**HE Defendant not confessing all, or none of the Intention of the Plaintiff; it stands him in hand to produce Witnesses to prove his Intention or Libel, either the Whole, or that Part thereof which is not confessed by the Defendant; in order whereunto, he must get Letters Compulsaries decreed against the Witnesses he thinks fit to name; and these are another sort of Special Citations, spoken of before*.

* *Wesemb. in Paratit. Cod. num. 5. lit. D. Scurfus. Conf. 9. num. 3. Cent. 1.*

2. They are wont for the most part to be obtained when there is Satisfaction given, as to the Answer of the Defendant; though sometimes they are obtained at the same Time the Citation, *pro parte*, is granted, with a *Proviso* that the Witnesses be not produced before the Defendant has given his Answer: And in like manner as the Plaintiff obtained the Citation, for the principal Party to give his Answer, so must he obtain these Letters Compulsaries, by alleging, That there are such and such Persons who are fit Witnesses, &c. † whom he desires may be compelled to come and give their Testimony, &c. Whereupon the Judge grants his Petition.

† *Alciat. de rest. fol. 148. Sect. qualiter sint testes producendi.*

3. And these Compulsaries are likewise for the Witnesses to appear, either before the Judge himself, or before Commissioners appointed by him for that purpose, (which Commissioners ought then to be named, and the Commission likewise granted) before whom the Witnesses must be examined some Time within the Term-Probatory; and at the

the Time they are cited, the Plaintiff ought to tender them, or at least to promise them, their Charges of Journey, &c. and this ought to be, whether they appear before the Judge, or before Commissioners, &c. The Proctors are also admonished, (at the time these Compulsaries are obtained) to be present at the Examination of the Witnesses, (if they be to be examined before Commissioners) in like manner as at the taking the Personal Answer.

C H A P. IV.

Of Proofs to be produced by the Plaintiff upon his Libel, or other Matter, on or before the Day assigned for that Purpose, called in the Law the **TERM-PROBATORY**, and of Exceptions against those Proofs, &c.

S E C T. I.

1. *What this Term-Probatory is, * and to whom it appertains.*
2. *What Proofs are, and how manyfold, and how they may be said to differ, &c. and when produced.*

* *Probatio autem non est in transcurso facienda, sed citata diversa parte ad ejus expeditionem, & termino justo ad id praestituta. Datur autem unus & idem terminus Actori & Reo, &c. Wesemb. de prob. n. 8. in ff. Chilian. in pract. c. 17. & Wesemb. ubi. f. T. de test. n. 5. lit. B. colum. 2.*

A Term-Probatory, is said to be that Time or Delay which was given to the Plaintiff, wherein he might prove what he pleads or sueth for; nor has the Plaintiff the sole and absolute Benefit of it: For the Defendant may likewise make use of this Term, if the Plaintiff renounceth as is shewn afterward.

2. A Proof, in this Sense, is making the Matter evident to the Judge, so as he may be able to determine the Controversie impending; in a large Sense, it signifieth a setting forth the Matter before the Judge: More strictly it signifies

* *Mascardus de Proba. volum. 1. 94. & 3. Wesemb. in paratit. ff. de proba. & pres. n. 2.*

† *Alciat. de Proba. fol. 140. Baldus in additione a speculationem de testibus. Sect. nunc videndum.*

(a) *De hisce* Proofs (a) which have relation to the Matters of Fact, are said to be either

(b) *Mascard. de prob. vol. 1. quest. 4. n. 16. Umnius disp. 15. th. 1. Alc. ubi s. & in tract. presumption. in prin. par. 3. n. 2.*

Wesemb. in ff. de prob. & pres. n. 4. ubi plene de his probation. divisionibus reperias. Specul. later tit. de prob. Sect. videndum.

fies that full Proof, which is made by Witnesses and Instruments*. Now Proofs are said to be Twofold, in respect of the Matter in Controversie: One sort of Proof has relation to the Matters of Fact, the Other has relation to the Matters of Law which occur therein; and this sort of Proof last mentioned, ought to be made by the Laws, Customs, Canons, &c. sometimes Directly, sometimes by Arguments †.

Most evident, which are such Proofs as are made by Privileges, Instruments of undoubted Credit, &c.

Evident & clear, or full Proof, which makes so much Proof, as serves to determine the whole Suit; & this is done, either by

Witnesses.
Instruments, i. e. Writings,
Confession.
Evidence of the Fact.
An Oath.
A just Presumption.
Fame.
Undoubted Circumstances.

Less Evident (b), which make some Proof of the Matter, but not so much as will serve to ground a Sentence upon; this is made by

One Witness.
A private Book, or Writing.
A mean, reasonable, or indifferent Presumption.

Likewise those Proofs which are made by Witnesses, may be said to differ, in respect of the Form of Speech, in like manner, as the Answer of the Defendant, or principal Part was said to vary. And these Proofs are usually produced after the Suit is contested, and not before, (that is, at any time before the Term assigned for Proof [called the

Term

Term-probatory] be expired.) *Alciatus* * recites several Cases, in which the Proofs (the Witnesses at least) may be produced before the Suit is contested.

* *Ubi f. de Test. fol. 146. Wesemb. ff. ubi f. n. 9. & T. de testibus n. 5. lit. A.*

S E C T. 2.

The Manner of bringing in the Letters Compulsories against the Witnesses.

1. *How brought into Court, and how a Citation, viis & modis, is obtained upon the same, if the Witnesses could not be found, &c. also the Term-Probatory to be prorogued.*
2. *The Manner of Proceeding, if none of the Witnesses cited do appear.*
3. *Also if some of them appear, and the rest abscond.*

I Omitted in the last Paragraph of the foregoing Chapter to acquaint you, the Manner and Way Mr. Clarke observes, in requesting the Witnesses to come and depose their Knowledge, &c. * against such a Day, within the Term-Probatory: Which Day coming, and the Witnesses not appearing, the Proctor of the Plaintiff must alledge to the Judge, That there were such and such Witnesses, very necessary to prove the Contents of the Libel given in by him, which were desired and requested to appear, &c. and that notwithstanding their Journey-Charges were offered them, yet they have refused, or at least deferred to come, or (if it be so) that they have promised to come, but come not: Whereupon, he must desire they may be compelled to come and give their Testimony, &c. And he must also swear to the Truth of this his Allegation, That it is according to the Information given him, which he believes to be true, (except the principal Party himself, or some other who did request them, be present there in Court; for then they must swear positively, and not *de Credulitate*) that is, that the Witnesses were requested as aforesaid, and their Charges tendred, and that this his Information he believes is true. Upon which Petition, the Judge decrees

* *Plurimi (inquit Lanf.) dicunt quod requiritur ut test. sic citatus, aliter reddat se suspectum, quæ opinio est omnino falsissima; imo si sit tantum rogatus valet dictum suum de test. n. 9.*

crees them so to be cited or compelled to appear [upon some Day before the Term be elapsed] to the Effect aforesaid : Which Term-Probatory, if the Plaintiff fears will be almost elapsed, before he gets these Compulsaries (so Decreed) executed, and certified ; it will be requisite, that he do at the same Time desire the said Term to be prorogued or prolonged to some farther Day ; and this is the Citation or Compulsary we are to presume, and suppose, is to be brought into Court on this Day thus prorogued. Wherefore if the Plaintiffs Proctor (making manifest his Diligence) do exhibit the said Decree or Letters Compulsaries, and Testify either by an Authentick Certificate, or the Oath of a Mandatory, That all possible Diligence was used in order to cite the said Witnesses, and that they do so abscond, or are absent from their Homes, that they cannot be personally cited : Then the Judge doth grant Letters Compulsaries, or a Citation, *vis & modis, &c.* against the said Witnesses to the Effect aforesaid : Against which Time appointed for their Appearance in this Citation, the Term-Probatory is also to be prorogued. We need not here speak of the Manner and Form observed in the Executing these Citations, having already done it before.

2. This Decree or Compulsary against the Witnesses is to be exhibited, and authentically certified, and the Contumacy of the Witnesses accused ; and if they appear not, they are to be Excommunicate as above ; and in that Case also, the Term-probatory is to be prorogued against some competent Day, within which Time, 'tis probable this Excommunication may be extracted, denounced, and certified : And if these Witnesses stand Excommunicate Forty Days after the same is denounced, the Plaintiff may proceed against them (if he will) as in the former Chapters, where it is spoken of Excommunications, &c. and if the Plaintiff do not use all Diligence in the Premises, (*viz.* in procuring the Witnesses to Excommunicate, Signified and Imprisoned) then the Proceedings are not to be delayed in Prejudice of the Defendant, but the Defendant may desire that the Cause may be concluded. And observe, that all Things spoke of in this Paragraph touching the Witnesses,

the Place likewise against the Defendant, if he fall under like Circumstances, so as the Plaintiff cannot proceed without his Answer. Likewise, though the Plaintiff may use all Diligence to the Effect aforesaid, yet, (lest the Suit should be too much prolonged by this proroguing the Term-Probatory, whilst he is in search after the Witnesses, and getting them imprison'd, &c.) he ought to produce other Witnesses within that Term, if he has any; and because sometimes the Premises are purposely managed on this Manner by the Plaintiff, (who has a bad Cause) to obstruct the Suit, and increase Charges, to the Grievance of the Defendant, who perhaps is Poor; the Judge may, on the Request of such Defendant, proceed to a Conclusion in the Cause, and pronounce his absolatory Sentence on the Defendant's behalf, yet the said Witnesses are to be admitted at any Time before the final Sentence is pronounced; and though it be concluded in the Cause, and the Defendant may except against the said Witnesses, in the manner as if they had been produced within the Term-Probatory, or before the Conclusion; for by this Production of the Witnesses, the Conclusion in the Cause is prohibited and rescinded.

3. Also, if only some of the Witnesses are cited, and the rest abscond, so as they cannot be cited; in this Case the Plaintiff must exhibit the aforesaid Mandate with a Certificate thereupon, and accuse the Contumacy of *M. N.* and the Witnesses cited to appear this Day, and at this Place, &c. and desire they may be reputed Contumacious, and (in Penalty of this their Contumacy) that they may be Excommunicate. Then they are to be called by the Crier of the Court, and if they appear, they are to be produced, admitted and sworn; and the Proctor of the adverse Party may protest against, and dissent from the Premises. And as to the Witnesses which abscond, and cannot be cited, the Proctor of the Plaintiff may alledge, that the other Witnesses named in the Mandate by him introduced, were diligently sought, but could not be found; wherefore he must desire, that they may be cited (to appear on a Day) Personally, if they can be so cited, or else by any other Ways and Means, so as this Citation may come

come to their Knowledge; which Petition the Judge grants. Then he must desire, that the Term-Probatory may be prorogued, as to these Witnesses thus to be cited, which the Judge likewise grants, appointing a Day, which seems sufficient for this Purpose in his Reason, if Diligence be but used.

S E C T. 3.

The Manner of Producing, Swearing, Examining and Repeating the Witnesses before the Judge, &c.

1. *The Manner of producing Witnesses.*
2. *Their Charges to be tendered before they Swear.*
3. *The Form of their Oath, and the Protestation of the Proctor of the adverse Party, at the Time of their Swearing, and his requesting a Time for Interrogatories.*
4. *The Manner and Form of the Interrogatories to be administered by the adverse Party.*
5. *The Manner of Examining and Repeating the Witnesses before the Judge.*

1. **W**E have shewn before, what Course ought to be taken, in order to the getting Witnesses to be examined, (either before the Judge or Commissioners) within the Term-Probatory, or before it be elapsed. We now come to shew how they are produced, upon or within this Term. Wherefore the Plaintiff, having his Witnesses ready in Court, must acquaint the Judge, that he produces these as Witnesses upon his Libel, whom he desires may be admitted, and sworn to depose the Truth which they knew touching the same. Then if the Defendant has any Thing to object against the Admission of these Witnesses, he is to propound it before their Oath be administered; * and if he propounds nothing, then the Judge admits them.

2. Now if the Party, producing these Witnesses, has not compounded with them for their Charges of Journey before he produced them, they may (either by themselves

* *Sci. de*
test. fol. 143.
Sett. qua pos-
sint cont. test.
abfici.

or some Proctor in their Name) desire the Judge to order them their Charges before they take their Oath. Then the Judge (taking into Consideration the distance of the Witnesses Habitation from the Place of Judgment, as also whether they be Horse-men or Foot-men, with respect also to their Quality, and their Abode at the Court, before their Examination be perfected) is wont to tax and allow these Charges, and order that they be not examined before these Charges be paid; or he may (if the Witnesses desire it) Decree a Monition against the Party producing them (if he be not present in Court); but if he be present in Court, then he is to be admonished there to pay the said Charges within a certain Day: And in this Taxation, the Judge is also wont to allow the Fee of the Monition; as also of the Proctor, if the Taxation be desired by a Proctor: And if the Party producing these Witnesses; take no Care to pay these Charges according to the said Monition, the Witnesses may proceed against him by the way of Excommunication, and *Significavit* to the King's Majesty, according to the usual manner. Likewise those Charges in and about the same are to be taxed by the Judge, and the Party producing these Witnesses ought to be compelled to pay the same before he be absolved, &c.

3. These Charges being thus paid or satisfied, or ordered in manner as before; the Witnesses are then to lay their hands upon a Bible, or Testament, to whom the Judge speaks in Effect as follows *. *You are produced as Witnesses in such a Cause, betwixt such and such Persons; therefore you, and each of you, shall swear, That at the Time of your Examination, you, and every of you, will depose and testify the Truth, and the whole Truth, so far as you know, without any Love, Favour, Affection, or Malice, to either of the Parties in Suit, &c. So help you God.* Which being done, the Witnesses (in testimony that they take this Oath in Manner and Form as the Judge doth administer it) are to kiss the said Book. Whereupon the Defendant's Proctor does dissent from this production of the Witnesses, and does protest as to its nullity, and of saying or propounding against the same, *si adversa sit citat. n. 10. cui etiam W. semel. consentit, quod testes possint jurari parte ad- versa presente, vel absente contumaciter, ff. de test. n. 5. l. i. E. col. 1.*

* *Aliat. de test. fol. 148. ubi habes Juramenti formam; sicut in Lanfr. de test. depof. n. 3. praxis sua. Speculator. tit. de testium Juramento. lib. 1. part. 4.*

† *Ponitur questio à Lanf. ubi supra, an testis jurari possit nisi jurari parte ad-*

H

and

and against their Depositions and Persons, if they endeavour to depose any Thing against the Intention of his Client; and does desire that they may render sufficient and conclusive Causes for their Knowledge in what they depose, &c. and he must also desire a competent Time may be assigned him, against which he may provide Interrogatories to administer to the said Witnesses. Whereupon the Judge, perhaps, assigns a Day's Time for this Purpose if the Witnesses dwell within the City, or more if they dwell out of the City, or any Time before their Examination: Within which Time so appointed by the Judge, or before the Witnesses be examined as aforesaid, the Proctor of the Defendant ought to give to the Register, or Examiner, what Interrogatories he proposeth to administer. But observe, That when the Proctor believes the Witnesses (produced by the adverse Party) to be Men of good Credit, or such who will ('tis likely) depose for the Defence and Intention of his Client, it is requisite that (at the Time they are produced) he accept the Persons, and the Production of these Witnesses, so far as they make for his Client's Intention, &c. but protest against their Sayings and Depositions, in as much as they depose any Thing against the Intention of his said Client. In which Case, the Defendant may reprehend the Sayings and Depositions of the Witnesses, and may object against them, if they depose against his said Intention; but yet he cannot except against their Persons, having already accepted and approved them. Therefore the Party producing Witnesses, had need take care of producing Witnesses, who will depose (against his Intention) for the Right and Defence of his Adversary: For by this his producing them into Court, he seems so to approve the Persons of the said Witnesses, that he cannot afterward except either against their Persons or Depositions: In like manner the Defendant had need take care, how he produce Witnesses which have been already produced by his Adversary; for he also seems thereby so to approve their Persons, as he is not permitted afterwards to except against them as above.

4. Now the Defendant, or contrary Party, may (when the Witnesses are to be examined) minister Interrogatories against

against the said Witnesses, such as are Pertinent, or have Relation to the Cause or Matter. * *E. g.* If Witnesses are produced against you to prove any Will, which you endeavour to deny or overthrow; you may Interrogate them, if the Testator were of sound Mind and Memory at the Time pretended by the Adversary, wherein he made that Will, and whether he did this or that Thing, or said such and such Words, which might argue and shew the Soundness of his Mind and Memory; or you may Interrogate them of other Circumstances, as of the Day, the Hour of the Day, and the Place (a) where the Will is pretended to be made, and with what Words the Testator approved it, who wrote it, as also what Witnesses were by, and present then: And as touching (b) the Persons of the Witnesses, you may Interrogate them, whether they be of Affinity, Consanguinity, Domesticks of the Party producing them, or are clothed by him, or receive Wages from him, or are indebted to him: And whether or no they be not Enemies to the Party against whom they are produced, and the like. And at the end of these Interrogatories, you may add this following Petition, or Protestation, (*Scil.*) That the said Party administering these Interrogatories, does desire that every Witnesses may render a sufficient and concluding Cause of his knowledge, in all his pretended Sayings and Depositions given in this Cause, or otherwise the said Party administering these Interrogatories, doth protest as to the Nullity of this their Examination. I have heard (saith Mr. Clarke) from some Learned Men, (c) that this Petition and Protestation is very necessary, and that if they were omitted, the Witnesses (in some Cases) make good Proof on the adverse Party, though they give no conclusive and good Reasons for their Knowledge, which otherwise they ought to give, if interrogated or asked. Yet the Proctor who administers Interrogatories, had need be cautious and expert in the administering of them, because they oftentimes do benefit the Party who produceth the Witnesses, instead of injuring his Proof.

* What these Interrogatories are, *Vide Alciat. ubi s. de test. & Manual. Jur. de verb. sig. as al-* so their Form.

(a) *Hæc vocantur Interrogatoria specialia. Ummius disputatio 16. Thes. 10. Jacob. Blum. procur. Cameral. tit. 73. n. 91. & seq. Rosbach. proc. civil. tit. 55. n. 3.*

(b) *Hæc vocantur Interrogatoria generalia Rosb. ubi supra.*

(c) *Hæc opinio confirmari videtur à Lanfranco de test. depos. n. 17. Baldo l. solum. Cod. de test. Wesemb. de testibus n. 5. ff. lit. B. p. 913.*

5. Now if the Witnesses, at the time of their Production, are to be publickly and judicially examined touching their knowledge in those Positions they are produced upon, it is

very probable (at least, if they were not Men honest and of good Repute) they might easily so conspire and combine together, as to agree upon one Speech or Story: And sometimes the Party producing them being also present, through Fear of the said Party, they are apt to conceal the Truth, which probably they would otherwise confess, being that which chiefly makes against the said Party's Intention. The like may be said of the Defendant. Therefore in all the Courts of the Most Reverend the Archbishop of Canterbury, the Register (who is sworn to that Purpose) after the Witnesses are judicially produced and sworn, (in the presence of the adverse (a) Party) is wont to interrogate and examine these Witnesses severally, by Vertue of their Oath, (upon those Things, upon which they are produced) in some secret Place (b), all Persons being removed and withdrawn, especially the rest of the Witnesses, (whilst the other are examining, and also the Parties in Suit, (c) and each of their Sayings and Depositions the Register is to draw into Writing, and read the same distinctly to every Witness severally and apart, and interrogate and examine him and them respectively, Whether there be any Thing writ that is against or contrary to his Mind: And if the Witness desire a Correction, Amendment, Addition, or Substraction in any Thing, he ought immediately to do it. Then the Register ought to take Care, that the Witnesses write their Names or usual Mark to these their Depositions with their own Hand, lest the Register, or any other, should afterward vitiate this Deposition in any Particular. Which Examination being perfected by the Register, the Witness is to be brought to the Judge, before whom, in the Presence of the said Witness, the said Register is wont to read *Verbatim* this Deposition of the Witness, (d) which being read, the Judge is wont to interrogate the Witness Whether all Things there writ, and read by the Register be according to the Mind and Intention, and whether they contain the whole Truth of what he has to swear; and whether he would have any thing else added to this his Deposition, or subtracted from it: For at the time of his Reception before the Judge, the Witness may desire (if occasion be) to have all Things by him deposed, and writ

(a) *Vide que notavi in marg. num. 3. Prox. preced. ad formam juramenti testium.*

(b) *Wesemb. ff. d. prob. n. 9. p. 873. lit. A. & de test. p. 912. lit. E. Bartol. in l. nullum. Cod. de testib. Chilia. in pract. cap. 74 in fin. Vide Alciat. de test. Sect. de testium Examinatione Speculator tit. de testific. Sect. nunc tractand. vers. licet autem.*

(c) *Lanfr. ubi supra de test. n. 15.*

(d) *Ratio praxis hujus à predictis esse videtur, nempe quia examinatio coram Jud. fieri presumitur. Alciat. & Speculator cum multis aliis ubi supra.*

the Register to be corrected and blotted out, or any Part of it: But if the Witness do there ratify and approve before the Judge all Things so writ, and read by the Register in manner aforesaid, the Examination is then said to be perfect and compleat. For the Examination, tho' taken by the Register, and having all the due Solemnities observed as aforesaid; yet if the said Deposition be not acknowledged and repeated before the Judge as above, it avails not. And it is to be observed, That not only the Register, (at the Time of writing the Depositions of the Witnesses) but also the Judge himself, at the Time of their Repetition, is wont often to admonish the Witnesses the Danger of Perjury *, both to their Body and Soul, if they should depose in any Thing against the Truth. Let the Proctor take heed, that the Articles or Positions upon which the Witnesses are produced, be not dubious or long, containing many and divers Heads; for then the Registers may very often and easily omit some particular Positions and necessary Clauses, (at the Time of Examination of these Witnesses) chiefly relating to the Cause instituted: Which if they do, the Witnesses are easily deceived in not deposing fully to the Things contained in the Position, and the Party producing these Witnesses may be in danger of losing the Cause, in regard that these Positions were omitted. And seeing all Positions and Articles are usually writ in *Latin*, (by reason whereof, the Witnesses, specially Country-men, rarely understand them) therefore it is very requisite, That the Register or Examiner have a great Care in explaining and declaring distinctly and plainly to the Witnesses, all and singular the Heads and Contents of these Articles and Positions. [The Proctors then had need be careful of putting these Articles into too Elegant a Style; for if they do, they will impose too severe and difficult a Task upon some (pretending) Examiners or Scribblers in the World.]

* *Wesemb. ubi f. de test. p. 913. lit. B. Alciat. de test. Sect. test. examinatio. fol. 110.*

S E C T. 4.

The Witnesses not making a full Deposition, or refusing to answer to the Interrogatory, or other Matter on either Party, when examined.

1. *The Petition of the Proctor against them in this Case.*
2. *The Order of the Judge for a fuller Deposition, if need be.*

1. **T**HE Depositions of your Adversary's Witnesses being published, if these Witnesses answer not fully to any Interrogatory by you administered against them, or if it chance these Witnesses, at the Time of their Examination upon Interrogatories, by you administered as aforesaid, do refuse to answer to the same, or pretend that they are not bound to answer to them: The Proctor administering these Interrogatories must alledge, That such or such Witness or Witnesses, produced on the adverse Party, have not answered fully, or not at all, to such or such Interrogatories by him administered, referring himself to the said Depositions and Interrogatories, and to the Law; whereupon he must desire they may be called to answer fully to the same.

2. Then the Judge, if he be informed that they have not answered fully, and that the Interrogatories they have omitted so to answer to are pertinent to the Cause, and such to which the Witnesses ought to answer, he may Decree as is requested; or if he is not informed touching the same, he may assign the next Court-day to hear his Pleasure upon it; at which Time, if he is informed the aforesaid Answers are not full, he may Decree them to be called to give fuller Depositions or Answers; or, if he is otherwise informed, he may reject the Petition, either tacitly (by proceeding to other Things contrary to it) or expressly: And, lest this Petition be renewed again before this Decree be interposed, it will be requisite that the Proctor

of the other Party deny those Things so alledged to be true, and alledge that this Petition ought not to be granted; and if, after that, the Judge do grant the aforesaid Petition, the Proctor so denying it may dissent and appeal from such Decree as unjust,

S E C T. 5.

The Manner of producing the Witnesses before Commissioners, and the whole Order and Method of Proceeding in order thereto, and after it is accepted of by them.

1. *The Causes why Commissions are granted ad Partes, for examining Witnesses.*
2. *How manifold Commissions may be said to be.*
3. *The Manner of obtaining, executing, and certifying the Commission, and the Manner of admonishing the Proctor of the adverse Party to be present.*
4. *The Manner of obtaining the other Sort of Commission for examining Witnesses within the Jurisdiction of the Judge, and the Form of Protestation made (by the Proctor of the adverse Party) at the Time of granting the same, and the Order of his administering Interrogatories.*
5. *In what Cases, and when this Commission may be renewed.*
6. *The Manner of presenting this Commission to the Commissioners, and how accepted of, or undertaken by them.*
7. *How proceeded upon, after the Execution of it is undertaken, if the adverse Party appear not.*
8. *The Petition of the Proctor, who obtains this Commission, if the Proctor of the adverse Party, or his Substitute, are present at the Execution of this Commission; also the Tenor of such Substitution.*
9. *The Petition of the principal Party if he appear in Person, and not by his Proctor, at the Time of executing this Commission.*

10. The Manner of alledging the Contempt of the Commissioners, if they neglect or omit to transmit their Proceedings or Transactions in the Premises.
11. The Manner of certifying the Judge (who grants this Commission) of the Execution of it.
12. How this Commission is to be exhibited, and opened before the Judge who granted it.

1. **I**T may probably be objected against this Method as preposterous, in regard that what is here considered, as to the Manner of obtaining Commissions, &c. for this purpose, were only then to be considered, when the Letters Compulsaries were obtained for their Appearance, seeing that at the same time these Commissions are also to be obtained: However, my Hope is, That the Mistake is pardonable, being it produceth no great Error, but may, I hope, render the Matter more obvious to every Capacity, than if it had been spoke of apart. The chief Causes therefore of Commissions, are the Remoteness of the Witnesses from the Place of Judgment, their Inability of Body in respect of Age, or some Accident, &c. in which Case, their Examination is to be made, or brought about, *per subsidium* (a) *juris*, by a Supply of the Law. *Alciatus* shews the Reason of these Commissions to the full, in the Place even now quoted.

(a) *Wesemb. parat. ff. de test. n. 5. p. 911. lit. c. Speculator. Sect. 1. n. 45. Alciat. de test. Sect. de test. exam. vers. & ubi.*

(b) *Gail. 1. Ob. p. 100. n. 11. Ruland. de commiss. lib. 1. c. 2. n. 8. 9. Ordo Cameral. p. 3. t. 17. Rebuff. in tit. de inquis.*

(c) *Lanfr. de test. dep. n. 16.*

2. Commissions are manifold, as Authors (b) observe: Those here meant are of Two Sorts, (*Scil.*) the One of them being such, as doth immediately authorize the Commissioners, (that is, being the Witnesses do dwell within the Jurisdiction of the Judge who grants this Commission) the Other such, as doth mediately authorize the Commissioners, as where the Witnesses live in another Jurisdiction; in this Case, the Authority of that Judge where they live (c) must be implored, before their Examination can be compleated; and in this respect, it is a mediate Authority, depending upon the Will of another; which sort of Commission is called, a Commission *Sub mutue vicissitudinis obtentu*.

3. Sometimes it falls out, that divers Witnesses of the Plaintiff or Defendant inhabit out of the Province of *Canterbury*, so that they cannot be compelled to appear before the Judges of the said Archbishop to give their Testimony, because no Man is compelled to appear before an incompetent or unfit Judge, (that is, One having no Authority to call him.) The Party, who intends to use the Testimony of these Witnesses, must alledge to the Judge, That *N. M. and O.* are fit Witnesses, and very necessary to prove the Contents of his Libel, or other Matters pronounced and given in on his Part, and that they inhabit in such a Diocess, without the Province of *Canterbury*, by reason whereof they cannot be compelled to appear in this Court, to give their Testimony in this Cause; and hereupon he must offer himself ready to make Oath of it, according to the Information of his Client, which Information he believes to be true; and therefore he must desire a Commission may be decreed, in order to the Enlargement of their Authority herein, (and as a Supply of the Law) to the Reverend Father *M.* Bishop of the said Diocess where the Witnesses inhabit, and to *N.* his Vicar General in Spiritual Things, and Official Principal, jointly and severally; and that they may be requested (in Supply of the Law as aforesaid, & *sub mutue vicissitudinis obtentu*) to compel the said Witnesses to appear before him, or either of them, on such a Day, and in such a Place, to give their Testimony in this Cause; and in order hereunto, he must desire that the Judge will please to grant his Power and Authority (so much as lies in him) to the said Bishop and his Official, jointly and severally, to receive and examine the said Witnesses, as also with a Requisition to desire them to prorogue the Day and Place of Examination, if need be, and that they may also be requested to certify and transmit (to the said Judge in so requesting) the Sayings and Depositions of the said Witnesses, and all the Proceedings to be made, in and about the same, on such a Day: Also the Proctor, thus desiring this Commission, must likewise desire that the Proctor of the adverse Party may be admonished to be present at the Time of executing this Commission, if he thinks himself

self interested in it. Whereupon the Judge Decrees this Petition of the Proctor, and admonisheth the Proctor of the adverse Party to be present, as is requested: And lest the Term-Probatory should be elapsed before this Commission be Executed and Returned; the Judge doth also (at the Petition of the said Proctor obtaining this Commission) prorogue the Term-Probatory until the Court-day following, the Day assigned for the Transmitting of this Commission.

Now this Commission is to be drawn to the aforesaid Effects respectively, and is to be presented to the Bishop, or his Vicar-General, and to be proceeded upon in all Things, in the Presence of the adverse Party, like as is spoke before, where the Witnesses are produced before the Judge; or if the said Party appear not, then they must proceed upon it in Penalty of such his Contempt for being Absent, as is spoke hereafter: And the like must be observed as to its Certifying, and other Things as is spoke afterwards. And it is to be noted, That if the Witnesses (required to give their Testimony, and to appear before the said Lord Bishop, or his Vicar, &c.) do refuse to appear, may Compel them, and Excommunicate them for their Contempt: But in their Citation, * or Compulsorial Decrees for these Witnesses to appear, they ought to make mention of the Dependence of the Suit in the Court, and before the Judge who grants this Commission, and that the said Bishop, or his Vicar, do grant this Decree, upon the Request of the said Judge, as a Supply of the Law, &c.

* *Lanfr. c.*
Quoniam de
prob. n. 9. Sect.
sed si.

4. Before the Term-Probatory is elapsed, as is before said, the Proctor of the Plaintiff, (though he has already produced some Witnesses in Court, or though he has not yet produced any) if he intends to make use of a Commission, may request the same on this manner, (*Scil.*) He must alledge to the Judge, that his Client hath several Witnesses, (very necessary to prove the Contents of the Libel by him given into Court) which are Old and Infirm, who (by reason of the Distance of the Place, the Badness of the Way, especially this Winter Time, &c.) cannot conveniently appear at the Court, without vast Charge to his Client.

ment, and the Peril and Damage of the said Witnesses: therefore he must desire a Commission may be decreed, granting full Power to some Honest Men (constituted in ecclesiastical Dignity) jointly and severally to sit in such Place, (*viz.*) in some Church or Consistory, (in order to examine the Witnesses to be produced before them) on such Days, with Power (if need be) of proroguing and continuing the Days and Place of Examination, having likewise some Notary Publick, who is indifferent to both Parties: He must also desire, that some Term may be assigned, against which these Commissioners may transmit their Commission, and the Proceedings upon it; and likewise that the Term-Probatory may be prorogued unto the said Day so assigned for the Transmitting the Commission, and that the Proctor of the adverse Party may be admonished to be there present as the Time of Executing the said Commission. All which several Petitions, the Judge grants in express Words, in the Presence of the Defendant's Proctor, who dissents from all and singular the Premises, done as well by the Judge as the adverse Party, and protests concerning the Nullity of such their Doing, and of propounding or excepting against these Witnesses, their Depositions and Persons, (as well now as then, and then as now) if in any thing they endeavour to oppose against the Intention of his Client; whereupon he must desire the said Witnesses may be examined upon such Interrogatories as are to be annexed by him or his Client to the Commission, or to be administered to them on one of the Days appointed for the Executing the said Commission before the Commissioners; and that they may answer under good and conclusive Causes and Reasons (for their knowledge) in their Depositions, or otherwise he must protest concerning the Nullity of this their Examination; which Petition the Judge decrees. In these Days, the Proctors are each of them wont to nominate Commissioners, out of which the Judge chuseth Four, (*viz.*) Two out of those Four named by the one Party, and Two out of those Four named by the other Party: But formerly the Judge (and not the Parties) was wont to nominate all the Commissioners, and then they were oftentimes Persons indiffer-

rent

* *Alciat. de test.*
Seff. de Interr.
fol. 149.

rent to the Parties, though now it is otherwise; for the Parties having the Naming of Commissioners, name only such as are most like to befriend them in the Matter, if it lie in their Way; so that commonly they cannot be said to be Commissioners of the Judge, but of the Parties, and carry themselves like Parties when the Witnesses are examined; and do oftentimes signifie to the Parties the Depositions of the Witnesses before the Publication is made, yea sometimes before all the Witnesses are produced. Also observe, that if the Proctor (against whom this Commission is granted) intendeth not to be present at the Time of executing the same, nor to administer Interrogatories at that time of its Expedition, he may give what Interrogatories he hath a Mind to the Register of the Judge (who grants this Commission) and he ought to annex the same to the Commission, and seal the said Commission with the said Interrogatories with some Authentical Seal, so that the said Interrogatories may not be read, * or looked into, either by the adverse Party, or any other, until the said Commission be presented before the Commissioners, and opened by them. Likewise observe, that though the Defendant do cause any Interrogatories to be annexed to the said Commission as aforesaid; yet may he, if he will, (especially if he be present at the Time of the Production of the Witnesses) either detract from the said Interrogatories so annexed, or minister the same or any others before the Commissioners. And observe Lastly, that the said Protestation of the Proctor of the Defendant (at the Time of granting this Commission) is very necessary; for if neither the Proctor nor his Client do take care to be present at the Time of dispatching this Commission, and the Production of the Witnesses, but that the Witnesses are produced in their absence, &c. I have heard (saith Mr. Clarke) from some Learned Men, and so I have known it adjudged, that the said Party could not in this Case except against these Witnesses so received, in Penalty of his Contempt or Absence; and therefore the said Protestation, at the Time of granting this Commission, (*viz.* a Dissenting from all and singular the Premises or Matters done, either by the Judge or the adverse Party, in and about the same, and

and a protesting the Nullity of the same, and of objecting as well now as then, and then as now, against these Witnesses, their Depositions and Persons) is very necessary, and hath the same Force and Effect, as a Protestation made at the Time of producing the Witnesses.

5. Sometimes it so falls out, that the Commissioners, requested to accept the Execution of this Commission, are not at leisure to dispatch the same; or if having undertaken the Execution of it, yet for some lawful Causes, either concerning or relating to the Commissioners themselves, or to the principal Party, they cannot dispatch the same within the Time appointed; or if the Proceedings, upon the Execution of this Commission, cannot be transmitted upon the Day assigned for that purpose: If these Causes be alledged by the Party obtaining this Commission, and if the Commissioners do by their Letters, or otherwise, signify to the Judge these Impediments, this Commission is to be renewed, and the Term-Probatory is to be prorogued as above, except that the adverse Party do alledge, that these Causes are not true, and do offer to prove the contrary: But if he make Default in the Proof of that his Alledgment, he is not only to be condemned in Charges, but the adverse Party will also have Restitution of him for such Hindrance. And on the contrary, if he prove what he alledgeth, he shall have his Charges, and the renewing of his Commission must be denied the other Party: And observe, that infinite Causes may be alledged, in order to the Renewing of the Commission, and the proroguing the Term-Probatory, as the Plague, War, the Mandate of the Prince, some Arbitration, Imprisonment of the Party, Poverty, and the like: Which are left to the Arbitriment of a just Judge, except in those Cases where the Law expressly forbids Restitution to be made.

6. Now the Party who intends to produce these Witnesses, after he hath obtained the Commission under the Seal of the Judge who grants it, he must go or send to the Commissioners named therein, and must take care that they go to the Place appointed upon some Day assigned in the Commission; Against which Day, the Witnesses

nesses which he intends to produce, or to be requested to appear before the said Commissioners then sitting, with a Notary Publick (requested also for this Purpose) in a Place assigned in the Commission, that is, in the Quire or Chancel of the Cathedral Church, or of a Parish Church. Then the Proctor obtaining this Commission, or his Client himself, or some lawful Substitute of the said Proctor, must say as follows: *On the behalf of the Official of the beautiful Court of Canterbury on the Arches,* (if he be the Judge who grants this Commission;) or, (if the Commission be taken out of the Courts of Audience or Prerogative) *on the Behalf of the most Reverend Father in Christ, the Lord Archbishop of Canterbury;* I present unto you these Letters Commissionall, together with the Libel, Matter, Allegation, or Exception annexed; and I desire you will vouchsafe to take upon you the Execution of this Commission, and order that it may be proceeded upon, according to the Vigour, Form, Tenor and Effect of the same. Then the Commissioners taking this Commission into their Hands, do deliver it to the Notary Publick to be read *verbatim*: Which being done, the Commissioners take upon them the Execution thereof, in these following (or the like) Words: (*Scil.*) *Out of the Reverence we bear to the Archbishop, &c. We take upon us the Execution of this Commission, and do Decree, That it be proceeded upon according to the Force, Form, Tenor and Effect of the same, and we do take this Notary Publick to be the Scribe or Writer of our Acts in this behalf.* Here the Commissioners ought to be admonished to take care what Notary Publick they take unto them in this Affair, (except it be the Register of the Court, or some other deputed by him) for sometimes the Party obtaining the Commission produceth a Notary Publick, who, perhaps, is a Friend to him, but an Enemy to the adverse Party, and desires him to be accepted of; and therefore, in all Commissions, there is Power given to the Commissioners, to take unto them any Notary Publick who is indifferent to the Parties.

7. If the Original Proctor of the Party obtaining this Commission be present, all Things following ought to be dispatched and done in his Name, like as if the said Proctor were present before the Judge himself. But if these Things

Things following are to be done by the Substitute of the said Original Proctor, as it happens sometimes; then the said Substitute ought, in the first Place, to exhibit an Authentical Substitution granted him by the said Original Proctor, and make his Part for the same: But if the Things hereafter written are to be done by the Plaintiff himself, then he ought to do them under a Protestation of not Revoking the Original Proctor, already constituted by him or his Proxy, &c. For if the principal Party acts any thing in his own Name, or obtains any Petitions of the Judge, if he does it not under such a Protestation of not revoking the Proctor already constituted by him, the Mandate is revoked *ipso facto*. Wherefore the Proctor appearing as before said, he must accuse the Contumacy of N. the Proctor of the adverse Party named in the said Letters Commissional, and judicially admonished to be present in this Place on this Day, to see certain Witnesses produced and sworn on behalf of N. the Plaintiff, upon the Libel annexed to the said Commission: Who being called, and taking no Care to be present, he must desire that he may be reputed Contumacious, and in penalty of such his Contempt, he must produce M. N. and O. as Witnesses to this his Libel, and desire they may be received, admitted, and have their Oaths administered. Then the Commissioners must cause the Proctor of the Defendant to be publicly called Three Times; and if neither the said Proctor, his Substitute nor Client, do appear, they must pronounce the said Proctor Contumacious, and in Penalty of such Contempt, they must admit the said Witnesses, and administer them their Oath, as before, at the Third Paragraph of this Chapter. And afterwards, the Notary Publick must examine them secretly and severally in the Presence of the Commissioners, or some One of them. Then the said Proctor so producing these Witnesses, if he hath more Witnesses to produce whom he hath requested to be present, if they come not, he must alledge, That P. Q. and R. were Witnesses, very necessary † for his Client to prove the Contents of the Libel, or Matter annexed to the Commission, and that they were requested to appear on this Day, and in this Place, to give their Testimony in this Cause, and that

though

† *Secunda et
tertia dilatio
permittitur si
non est prob. suf-
ficiens sed non
quarta nisi cum
solemnitate le-
gali.
Alciat de test.
Sect. de attestat.
publicatione. f.
150. Lanf. de
test. depo. n. 40.*

though their Charges of Journey, &c. were offered, yet they refuse to come: Wherefore he must accuse the Contumacy of *M.* (the Proctor of the adverse Party aforesaid) who was admonished as before, and taketh no care to be present. And desire he may be reputed Contumacious, and in penalty of this his Contumacy, he must desire that the said Witnesses, may be compelled against such a Day to give their Testimony; then Oath being made of this by the said Proctor (desiring these Compulsaries) or by some special Messenger appointed to make Faith, (that the Witnesses were so requested) and of the Truth of this Allegation; the Commissioners must cause the aforesaid Proctor to be called again Three Times, upon, which if he appear not, they must pronounce him Contumacious, and, in Penalty of such his Contempt, they must decree the said Witnesses to be compelled to appear against such a Day. Then the Proctor of the Plaintiff (lest the Days assigned in the Commission should be elapsed before the Execution and certifying of these Letters Compulsaries) must farther accuse the Contumacy of the Defendant his Proctor, &c. and in Penalty thereof, he must desire the Day and Place (for the further Expedition of this Commission) to be continued, and prorogued until such a Day and Place: Upon which, the Commissioners (after the said Proctor has been Three Times called as before) do pronounce him Contumacious as is desired, and in Penalty, &c. they prorogue the further Expedition of the Commission until such a Day, (and such Hours of the Day, and to such a Place) against which the Party, requesting this Prorogation, believes it possible for him to get the said Witnesses ready to appear. For if this Prorogation were not made, and that in penalty of the Contempt of the adverse Party his Proctor, the said Proctor (the Days assigned in the Commission being elapsed) would not be Contumacious for not appearing in the Place and on the Day, so prorogued or continued; whereas now if he appear not at that Time so prorogued or continued he becomes as Contumacious, as if all Things had been done on the Days and in the Place limited in the Commission. And observe, that generally nothing is to be requested by the Proctor, (at whose Instance this Commission is granted)

nor any Thing to be decreed by the Commissioners, except it be so done in Penalty of the Contempt of the Proctor of the adverse Party, who is to be called, accused, and pronounced Contumacious in manner aforesaid.

8. If the Proctor of the adverse Party, or his Substitute, are present at the Time of dispatching this Commission, the Proctor of the Plaintiff must present the Commission, and the Commissioners must accept the Execution of it, and do all Things in like manner as was even now spoke; and if this Proctor of his Adversary, or his lawful Substitute, exhibiting his Substitution in Writing, under some authentical Seal, or publick Instrument, or at the Act of Court of the Judge who grants this Commission) do appear, the Witnesses are to be produced, and a Prorogation or Continuance of the Cause or Commission to be decreed, (if upon just Causes it be requested by the Party obtaining the Commission) and all and singular the Premises are to be dispatched in his Presence, and he is to be admonished to be present at the Day and Place so prorogued, and if he appears not then, they may proceed in Penalty of his Contumacy : And if these Things are so done in the presence of the Proctor of the adverse Party, or his Substitute, as is before said, the said Proctor or Substitute ought to protest and dissent, like as the principal Party doth, when the Premises are dispatched in his Presence, of which, in the following Number. Now it is requisite we know how this Proctor must be substituted; seeing we said before, that in every Proxy, or Mandate given by the Client, there is Power given to the Proctor to substitute another in his stead, so often as he chanceth to be absent : Therefore the Proctors, as well of the Plaintiff as of the Defendant, if they are not conducted by their Clients to be present at the Execution of the Commission) are wont to substitute in their stead one or more Notaries or Literate Persons, residing in those Parts where the Commission is to be executed, to act and do all Things necessary (for the said Proctor) in and about the Expedition of the said Commission, and what the said Proctor may or can do, if he were present in Person : And in this Substitution, he ought to add, That he is ready to ratifie and confirm what-

soever his said Substitute shall do in the Premises; and this Substitution ought to be sealed with an Authentical Seal, and delivered to the Party so substituted, with Instructions and Interrogatories requisite in these Cases; And here it is to be noted, That if neither the Original Proctor of the adverse Party, nor the Party himself, be present at the Time of the Expedition of the said Commission, but some other who pretends himself to be a Substitute of the said Proctor, and who exhibits a Substitution in the Name of the Defendant's Proctor; it is very requisite that the Proctor of the Plaintiff take diligent heed, that the said Substitution be authentic and sufficient, for otherways all Things done in the Presence of such supposed or unlawful Substitute are void in Law, and do not prejudice the Defendant, nor advantage the Plaintiff.

9. But if neither the Proctor of the Defendant, nor his Substitute, are present at the Time of executing the aforesaid Commission, but the principal Party himself, (to whom, perhaps, his Proctor has sent Interrogatories, to be administered to the said Witnesses of his Adversary) then must the said Party (under Protestation of not revoking the Proctor already by him constituted in the Cause) dissent as above, at the production and swearing of the Witnesses, and then administer his Interrogatories, if he has any ready, or which are annexed to the Commission; or else he must desire a Term may be assigned him to administer the same: Which Term, or Time, the Commissioners do assign according to their Pleasure, having respect to the Number of Witnesses, and the Weightiness of the Cause: But the Party thus appearing, had need be cautious how Mention is made of this his Petition in the Acts of Court; that is, that it was made under such a Protestation, of not revoking his aforesaid Proctor; neither let him dissent from any Petition of the Adversary, except under that Protestation, lest (as is said above) he seem to revoke the Proctor already constituted by him: The Witnesses are to be examined as before.

10. Now although in every Commission, granted to remote Parts for the Examination of Witnesses, a certain Day is assigned to the Commissioners, for the transmitting their Proceedings

ceedings, as above; yet if the Commissioners take not Care to transmit this their Proceedings upon the Day assigned them for that Purpose, they cannot, or at least are not wont to be Excommunicate; therefore in this Case, the Proctor, who obtains the Commission, (lest his Term-Probatory should be elapsed before the said Proceedings be transmitted) may alledge the not Transmission of it, to this following Purpose; (*Scil.*) He must alledge, That his Client, at a convenient Time and Place, took out a Commission to remote Parts, in order to examin Witnesses, &c. and that it was duly presented to the Commissioners named therein, and by them accepted, and dispatched according to the Contents thereof, and that the said Commissioners, at least N. their Notary-Publick, whom they took unto them upon this Account, takes no Care to transmit their Proceedings thereupon, though duly requested thereto, and, upon the Premises, he must offer himself ready to make Faith, and Proof; and desire the Judge his Decree, to call them to answer in a Cause of Contempt, or to answer Articles relating to their Contempt, and also desire that his Term-Probatory may be prorogued until some further convenient Day. This Petition (if the Proctor makes Faith of the Truth of it) the Judge is wont to grant, appointing a competent Time, as well for the Appearance of the Commissioners, as also for the prorogation of the Term-Probatory; except the adverse Party deny this Allegation, and do alledge and take upon him to prove the Contrary: Who, if he make Default in the Proof thereof, not only those Things (so requested by his Adversary) are to be granted, but he is likewise to be condemned in Charges for retarding the Proceedings. And observe, That in these Accidents, it is not required that there be full and exact Proof; but the Judges are wont to decree the Petition upon the bare Oath of the Proctor, so as it appears by the relation of the Register, that the Commission was duly extracted: And this Oath must be taken not *de veritate*, (as to the positive Truth of the Matter) but *de credulitate*, (as to the Proctor's Belief) according to the Information given him, which he believes to be true; (*viz.*) That the said Commission has not been presented, or certified to the Judge. Therefore, that the Commissioners may avoid

this Trouble, let them take care to signifie to the Judge (who grants this Commission) by their Letters Missive, the Reasons why they could not transmit this Commission on the Day assigned for this purpose.

11. This Commission being executed, the Notary-Publick, who was made choice of to exhibit and dispatch the said Commission, ought to draw a certain Certificate or publick Instrument, in the Name of the Commissioners, and direct the same to the Judge who granteth this Commission ; and in this Certificate, not only the Depositions of the Witnesses (and all Things acted and done by virtue of the said Commission) are to be inscribed or inserted, but also the said Letters Commissionall, the Interrogatories administred by the adverse Party, and the Substitutions, (if any were exhibited) are to be annexed to the said Certificate, and then the Certificate ought so to be sealed with some Authentical Seal, that it may neither be looked into, read, or altered in any Particular ; but the Notary ought to subscribe this Certificate with his Hand, and seal it with his Notary's Seal: And it is likewise necessary, that the said Notary do take care, that each Leaf of the Depositions be subscribed, not only by the Witnesses, but also by the Commissioners; for I have seen it objected, (saith Mr. Clarke) that the Notary hath corruptly transcribed the Depositions of the said Witnesses ; and likewise sometimes the Witnesses have said they have not deposed so, as is contained in the said Proceedings so transmitted: Which, if they should chance to say, when the Depositions are subscribed in manner as aforesaid, they may easily be convinced.

12. You have now heard how this Commission is to be certified, &c. And seeing it is said to be necessary for the Notary-Publick to take care to subscribe every Leaf of the Depositions, it is likewise equally necessary for the same Reasons, that the Notary-Publick transmit the Original Depositions themselves; for otherways, though all Things were done in manner as above, yet in the Transcribing or Copying of them, these Depositions are wont to be copied or transmitted corruptly, or at least not so exactly as they ought. But if the Notary-Publick doth not transmit the Original Depositions, but Copies, he ought to

to take diligent heed that the Originals be kept safe in his Custody ; so that if any Scruple arise touching the Truth or Falshood of the Proceedings so transmitted, it may easily be decided, by exhibiting the Originals. And from the aforesaid Causes, especially to avoid Fraud, (at least the Suspicion of Fraud) it is very necessary that, in the Commissions for examining the Witnesses, the Commissioners be admonished to transmit the Original Acts and Depositions. Which being done, and being transmitted in the Form of a publick Instrument, as is said above, the Proctor who obtaineth the Commission, (if the Notary-publick, who dispatched the same, is not present) he may procure any other Notary-publick to exhibit this Proceeding, upon the Examination of the Witnesses, on behalf of the Scribe or Writer of the Acts of the said Commissioners, &c. And then the Proctors must jointly exhibit the said Proceedings, in as much as they make for their Parts, or the Interest of their Clients : Yet the Proctor of the Defendant (immediately upon the Judge his accepting the said Proceedings) must Protest as to the Nullity of all the Proceedings, and of Excepting against the same, if they make in any Thing against his Client. But the Proctor, who obtained this Commission, may upon the same Day desire Publication of the Witnesses, or may defer Publication of them, until he be compelled to request it by the adverse Party desiring a Conclusion in the Cause or Acts preparatory thereto ; (*viz.*) a Term to propound all Acts, &c. in Plenary Causes, and to hear Sentence in Summary Causes; and in all Things else it must be proceeded in, as when the Witnesses are produced before the Judge.

S E C T. 6.

Of the publishing of the Attests or Depositions of the Witnesses, and the producing more Witnesses; together with Exceptions, Replications, &c.

1. *How and when the Depositions of the Witnesses are published, and how the adverse Party doth protest against the same.*
2. *How and in what Cases the Plaintiff may, upon the same Matter, produce Witnesses after Publication, and when he is prohibited so to do.*
3. *The Manner of Renouncing the Term-Probatory; and how it occurs to the other Party.*
4. *The Manner of Corroborating the Plaintiff's Witnesses, and when it may be done.*
5. *The Manner of Excepting against the Witnesses of the Plaintiff, and how manyfold these Exceptions may be said to be.*
6. *By whom these Exceptions ought to be given into Court, (Scil.) the Defendant himself, and the Reason for such Practice.*
7. *What Remedy the Witnesses may have, if they are defamed by these Exceptions.*
8. *Of Replications to these Exceptions, what they are, and their Manner and Form.*
9. *Why other and further Delays, or Liberty of Exceptions, are not permitted, except in some Cases. And when and in what manner the Defendant may, by way of Duplication, corroborate the Persons and Sayings of his Exceptive Witnesses.*

IF the Proctor of the Plaintiff believes, That he has sufficiently proved the Intention of his Client, and intends to produce no more Witnesses, he must request the Judge, that he will please to publish the Depositions of the Witnesses produced on his Part, and decree Copies thereof

to his Client; which the Judge † accordingly doth. Then the Defendant, if he has any Matter to propound, which is directly contrary, must dissent from the Publication of these Witnesses, * and protest, That he is not informed what the Witnesses already produced and examined have deposed: For if he does not so dissent and protest, and doth afterward give in a contrary Matter, if the Plaintiff doth object, That he hath been informed of the Depositions of the Witnesses; this Matter is not to be admitted, because it is presumed, that by propounding this Matter he hath been informed of the Depositions of the Witnesses of his Adversary, and hath thereby lost the Benefit of a contrary Defence: Whereas on the contrary, if the aforesaid Protestation be made, then any conclusive and pertinent Matter may be admitted, though it be directly contrary to the Propositions, upon which the Witnesses were produced, sworn, and examined, and whose Depositions are published as is aforesaid; except the other Party alledge and prove, That the Party propounding this Matter (notwithstanding the aforesaid Protestation) is informed of the Depositions of the Witnesses: And to prove this, he may compel the said Proctor of the Defendant (or the Defendant himself, who propounds this Matter, or both of them) to swear, † That they are not informed of the Depositions of the Witnesses of the Adversary, either by themselves or any other. And the Judge likewise, in this Controversie, (if it be requested of him) is wont to ask the Register, Whether he, or any of his Clerks, writ out any Copies of the Depositions of the Witnesses, and ever gave them to the adverse Party, his Proctor, or Solicitor: And if the Party, propounding this contrary Matter in the Premises, can no way be convinced of having been informed of the Depositions as aforesaid, then the same Matter ought not to be rejected. But because sometimes after the aforesaid Oath is taken, and the said Matter is admitted, the Party thus propounding doth procure Copies of the Witnesses of his Adversary, and by this Means informs himself of the Depositions of the said Witnesses, and upon the said contrary Matter endeavours to produce Witnesses: If the Proctor of the Plaintiff doth suspect the Defendant in the Premises,

† *Judex volens attest. publicare, partes citare seu vocare debet, aliter non sint aperienda Al'ciat. de test. Sect. de attest. publica. Wescemb. ff. de test. n. 5. p. 914. lit B. Specul. Sect. satis per dict. c. cum venissent. Zouch. p. 599. elementa juris.*

* *Ratio hujus protestationis traditur ab Al'ciat. ubi. Sect. de testium reprobatione, fol. 151. & Wescemb. ubi supra. n. 6. p. 916. ad fin. in ejusdem, Ferrariensis forma juram. testium, ubi protestan. n. 2. per cap. presintium cod.*

† *Lanfranc. de test. dep. n. 40. Sect. servata deb. solennitate. quando quis dicitur dedicisse testificato vide com. n. 33. & 38, 39. imo. interdum super capitulis omnino contrariis. ibid. n. 42.*

he may desire the said Oath to be administred again, at the Time of producing the Defendant's Witnesses, upon the said Matter : And then if the Proctor doth not purge the Premises by his Oath, or if he is convict herein, the said Witnesses are to be repelled, though the said Matter were admitted, a Term assigned for the proving the same.

* *Lanf. c. quoniam*, n. 8.
Myns. Inst. de Action text. superst. n. 11.

Gail. 2. obj. 81, n. 8.

† *Lanfranc. de test. dep.* n. 34. 37. & in n. 42. *versic. Aliud subjungo.*

‡ *Omnino videtur esse contrarium eisque norantur in cap. de Litis contestatione, res integra enim esse dicitur, ante litis contestat. & à nullis sic aestimatur postquam lis sit contestat. nisi à Domino Clarke, & (ni fallor) ita intenditur à Mynsingero in *Inst. de Mandatis. Sect. Recte* n. 1, 2, 3, 4, 5. *saltem à parte Actoris sed à parte Rei satisfactionem attendimus.**

2. If the Plaintiff or Defendant (who, when * he accepts, is made Plaintiff) produce Witnesses, and get their Depositions published, and are instructed what the said Depositions are ; yet if after the said Publication, and such their Information of the Depositions †, other Witnesses very necessary on their Parts come to their Knowledge, (the Matter remaining whole, ‡ that is, before the Cause be concluded) if they are present in Court, they may produce them, and they are to be received, and admitted. But if these new Witnesses refuse to appear, unless they be compelled ; the principal Party himself, and not his Proctor, (for his Proctor, in his general Mandate, hath no Mandate to do the Matters following) must appear in Court, and alledge, That (without any design of revoking the Proctor already by him constituted) M. N. and O. are Witnesses very necessary to prove the Contents of the Libel on his Part, and that he was informed that they were such, only since the Publication of the Witnesses already produced on his Part in this Cause, and not before : And upon the Premises he must offer himself ready to make Proof, and therefore desire those Witnesses, so present in Court, (which he there produceth) may be received and admitted, and that they may have their Oath administred, to depose faithfully upon the Contents of the Libel, already given into Court by him : Or if the Witnesses (being requested to be present) do not come, he must alledge, That these Witnesses were requested to appear on this Day in this Place, to the effect aforesaid, and that he offered them their Journey Charges : And upon the Premises, he must likewise offer himself ready to make Proof, and must desire, that these Witnesses may be compelled to appear upon such a Day, to give their Testimony, &c. then the Judge (unless the adverse Party do alledge, That he is informed that the Party desiring these new Witnesses to be admitted, had

some

Some Knowledge or probable Notice of them before the other Witnesses already examined were published, or that the Cause, in which such Admission of the Witnesses is requested, is of that Nature, that they are not to be admitted) ought to admit them if they be present in Court, or else he ought to decree them to be compelled to appear if they are absent, Proof being first made by the said Party [so desiring them to be admitted,] that the said Witnesses are necessary, and that he knew not they were so necessary, only since the Publication of the former Witnesses; as also, that the said Witnesses were requested to come, and had their Charges offered them. Upon which, the other Party dissents from the Premises, and protesteth as to the Nullity of the said Proctor or principal Party, and alledgeth, That it is no conclusive Petition in Law, and therefore ought not to be granted; and that the Publication of the Witnesses, already made by the adverse Party, and the information he hath had of what is already deposed, are Reasons sufficient why the said Petition ought not to be granted, and that there is great suspicion of Subornation of Witnesses, referring himself to the Law, and the Acts of Court. Now in some Cases, it may necessarily be concluded, that the Party (who desires these Witnesses to be thus produced) must know before of these Witnesses he now desires to produce: As in a Testamentary Cause, when the Witnesses already produced do depose, That the Party desiring to produce these Witnesses, was present (at the Time of making the Will), together with these Witnesses whom he pretends are but lately come to his Knowledge. Likewise in a Cause of Defamation, if the first Witnesses do depose, That the Words Defamatory were spoke in the Presence of the Plaintiff and those Witnesses, (whom he desires to produce anew) and so in all other the like Cases; and this probable Knowledge is sufficient to hinder the aforesaid Witnesses, so as no new Witnesses are to be admitted, unless that Party, so desiring this new Production of Witnesses, do by his Oath make clear this his Knowledge, or the vehement Presumption of his Knowledge, by swearing expressly, that he saw not these Witnesses, or did not call to mind, until after the other Witnesses were produced, and their Depositions

sitions published, that these Witnesses were so present. For in a Testamentary Cause, it might so fall out, (as sometimes it doth) that some of the Witnesses might be in the next Room, or listening through the Seeling, &c. to hear what is done by the Testator, about the Condition of his Will: And though, perhaps, the Witnesses already produced might see or know that the said Witnesses were so listening, yet the Party so endeavouring to produce new Witnesses, as aforesaid, might not see nor know that they were so listening. Also in a Cause of Defamation, if the Defamatory Words, mentioned in the Libel, were uttered in some publick Place, (as the Church, or Street where People are for the most part conversant) it may often so fall out, that the People passing by may hear and note these Words, and the Witnesses already produced, as is aforesaid, might likewise see these Persons so passing by, and so consequently might depose, That they were present, though the principal Party (being probably stirred up to Anger by these Defamatory Words) might not see these Witnesses: And to these may also be added, That if these Words were uttered many Months before, before the Action was begun, the Plaintiff may probably have forgot all the Witnesses that were present, though he saw them then; and he may now call to mind what Witnesses were present, because the Witnesses already produced by him have deposed, that they were present: But the Plaintiff, as is said above, ought expressly to swear, (if his Adversary urge it upon the Premises) because (as was even now said) his Knowledge in the Premises is presumed.

3. Now if the Party, who hath a Term-Probatory assigned, believeth (before this Term-Probatory is elapsed) that he hath proved his Intention sufficiently, he may renounce this Term-Probatory, and not only desire the Depositions of the Witnesses to be published, but also he may desire a Term may be assigned to hear Sentence in Summary Causes, and to propound all Acts, &c. in Plenary Causes respectively, and get a Conclusion in the Cause, if nothing be propounded by his Adversary: Though it is otherways, if your Adversary in that Time, (so assigned for your Term-Probatory) or on any other Day, before you renounce this Term-Probatory, do accept this your Term-Probatory, and

and does protest to use the same; for in this Case, though the Party, who had this Term Probatory assigned him, may request Publication of the Witnesses by him produced, yet he cannot, whilst this Term depends, (which is common to both Parties) obtain an Assignment to hear Sentence, or to propound all Acts, &c. in prejudice of his Adversary, who requires the same Right (by accepting the Term Probatory of his Adversary) as if the Term had been appointed absolutely to him to prove any Matter, and were yet in dependance; and admit that Party, who (as is afore-
 said) did protest to use the Term Probatory of his Adversary, do propound, or prove nothing at all during the said Term, yet may he, after it is elapsed, propound and prove any Matter whatever. But enquire, whether the said Party, by hindring his Adversary by his said Protestation, may not very deservedly be condemned in Charges, for retarding the proceedings: I think he ought, (saith Mr. Clarke) if he proves Nothing.

† *Myns. Inst. de Bonor. possess. Sect. si quis itaque n. 3. Lan. de dilation. n. 6.*

4. The Plaintiff also may propound any corroborative Matter, (on behalf of his Witnesses already produced) in that Day or Term assigned to the Defendant, to prove his Exceptions, and so he may use the Term * of his Adversary, (as is said above) and may confirm the Persons or Depositions of his Probatory Witnesses; or he may defer it, until the Term (assigned to the Defendant to prove his Exceptions) be elapsed: And then if he dissents from the Publication of his Adversary's Witnesses, and protesteth that he is not informed of their Depositions, &c. he may propound any Matter, corroborating as well the Depositions as the Persons of his Witnesses, and obtain a Term Probatory, in order to the Proof of it. Likewise, if the Plaintiff has produced two or more Witnesses to prove his Libel, and afterwards the Defendant, by way of Exception, doth blast or impeach the said Witnesses, or some of them at least, so that there are not Two left which are of Credit, and do not concord in their Depositions; then if these Witnesses are impeached by such Exceptions, (whereas it doth not appear, that the Party producing them had any Knowledge or Suspicion of their being such Persons, seeing all Men are presumed Honest, until the contrary appear) the said Party, whose

* *Lanfran. ubi supra.*

† *Lanfranc. de test. dep. n. 25. & seq.*

* *Alciat. de test. fo. 151. Lanfr. ubi s. n. 38. 43. Sect. Quæro.*

(a) *Hæ exceptiones sumuntur à circumstantia personæ à qualitate dictorum à forma examinationis de quibus Wesemb. plenius notavit, ff. de test. n. 7. specul. Sect. 1. in princip. c. quoties, n. 9, 10.*

(b) *Lanfr. de Excep. n. 11. si proponatur per modum exceptionis sufficit verbo coram iudice explicare.*

(c) *Quando testis singularis dicitur Lanfr. de test. n. 20. 23. per tot.*

(d) *Quæ Causæ repellunt testem à testimonio, copiose tractatur à Lanfr. ubi supra à numero 54. ad num. 96.*

whose Witnesses are defamed, may either corroborate his former Witnesses, or he may produce any other Witnesses whatsoever [directly] upon his Libel, as if none had been already produced. For the Laws say, That two Witnesses do make sufficient Proof; † and therefore the Plaintiff, by producing two Witnesses, may probably make them serve.

5. We come now to the Manner and Method observed in excepting or reproving Witnesses; and this is done either against their Depositions or Persons, and may be done * either before or after the Depositions of the Witnesses are published. These sort of Exceptions, seem to me to be those which were called Peremptory Exceptions in the foregoing Division; under these are also comprehended Replications, &c. in this Place is spoke of the Exceptions, (a) urged against the Witnesses of the Plaintiff; and this is done Two Ways, in General, and in Special. 1. In General: As when the Defendant hath no particular Exceptions to propound in Writing to hinder the Conclusion in the Cause, or he may by Word (b) of Mouth, to be inserted into the Court Acts, except against the Witnesses produced on his Adversaries Part, that they are various, wavering in their Depositions, (c) singular and disagreeing, contrarying and repugning one another in their Sayings and Depositions; that they are intimate Friends to the Party producing them, and Enemies (d) to the Party against whom they are produced; that they are affectionate, partial, and, as it were, concerned upon Account of the Party for whom they are produced; of an ill Fame, Vicious, Poor, Indigent, and of Consanguinity or Affinity, or Domesticks, and kept within the Family of the said Party producing them: And are cloathed, and receive a Stipend by the said Party; and lastly, such to whom no Credit is to be given: Which Allegation the Party so accepting must put, and desire to be admitted: Then the other Party must protest, That the said Allegations, so made by N. are false, and must protest of the Generality, undue Specification, the Inepitude, the Nullity, and the Inconcludency of these Exceptions, and alledge that the same ought not to be admitted, and therefore desire they may be rejected: And all Things being so done by the Party excepting, and by the other Party

Party dissenting, the Judge doth admit these Exceptions, far as by Law they are to be admitted; and then, if it is requested of the Proctor of the adverse Party, the Judge went to assign the Party propounding these Exceptions, Term-Probatory to prove these Exceptions, and also a Term to specify these general Exceptions; if it may also be decreed (though it is rarely practised) for the principal Party to answer to these general Exceptions; at least the Proctor propounding them take his Oath, That he believes, he may be relieved in any Part of them by the Answer of the principal Party, or the Adversary himself; but if the Plaintiff believe, that the Defendant has propounded these general Exceptions, with an intent unlawfully to defer the Suit, and to hinder a Conclusion in the Cause, he may (before these Exceptions are admitted) require, that the Oath of Calumny may be administered to the Defendant so excepting, in the presence of the Plaintiff. Now if he dissents (from the Party excepting, and requesting the Answer of the Plaintiff to his Exceptions) and protests of the Nullity of such Allegation, and of taking his Oath, to observe on his Part all and singular the Heads contained in the Oath of Calumny, and desiring that the said Oath of Calumny may be taken by the adverse Party. And if the said Defendant or Party excepting do refuse, or at least do not take the said Oath, then the Judge ought not to admit, but reject this Allegation † expressly or tacitly, proceeding to a Conclusion in the Cause, or some other way, contrary to this Admission of the Matter, if it be rejected: And if these general Exceptions are admitted, and a Term-Probatory is given; though the Party propounding these general Exceptions do afterward (either before the Term-Probatory aforesaid depends, or after it is elapsed) propound more special Exceptions, or Declarations of these general Exceptions, yet a new Term-Probatory is not to be given, as is said afterward, when we shew that the Term to propound all Acts is. But here it is to be noted, That so often as any Matter or Allegation is given to the Proctor of the adverse Party, if he cannot take the Oath of Calumny, as above, yet he may take this following Oath, (*Scil.*) That in propounding this Matter or Allegation,

† *Lanf. de test. dep. n. 43. Sect. Quæro num. quid post publicatas attest. excep. dari, possint contra personas testimonium, s. si juravit non malitiose se opponere, etiam si pars excipiens opponit contra personas test. tempore juramenti præstationis.*

* *Lanf. ubi su-
pra n. 46. cri-
men obiectum
debet specifica-
ri. n. 45.*

legation, he doth it not out of a malicious Mind, nor unjustly to defer the Suit; and that he believes his Client can prove the same: Which Oath, if he takes, the said Matter is to be admitted, so as it be otherways concluding. 2. Exceptions in Special, are those which are propounded in Writing, containing the Causes why a Witness is not a fit Witness, (*viz.*) because he is Infamous, * specifying how, and from what Cause, this Infamy ariseth; or that he is Vicious, an Adulterer, or Perjured in some Cause, or some part of his Deposition, specifying, as above, the Manner, Form, and Time of such Perjury. Then these Exceptions being admitted, they are to be repeated, and the principal Party is decreed to be cited to answer thereto, and Witnesses are to be produced to prove the same, or else a Commission is to be decreed unto remote Parts, as before, in order thereto: And note likewise, That before the Admission of these special Exceptions, the adverse Party may request, from the Party propounding them, either the Oath of Calumny, or the Oath even now mentioned.

6. Now seeing the good Name and Fame of any Person is much more damnified in a publick Court, and by Writing objecting their Crimes, than out of Court by Word or Mouth only, seeing Letters writ are permanent, and not so apt to escape Peoples Memory: And although the Party propounding these Exceptions, ought (as is daily practiced, if it be requested by the adverse Party) to take the Oath that he propounds not the same out of a malicious Mind, or unjustly to defer the Suit, and that he believes he can prove the same, as before; yet when the Parties in Suit have a bad Cause, and desire to protract the Suit, and avoid not only the Oath aforesaid, but also all Actions which may be commenced against them, by reason of their propounding these famous Libels, they procure some poor Vagabonds, or abject Wretches, (who have no certain Habitations) by vertue of a special Proxy made to this sole Purpose, to propound these Exceptions against the Witnesses of the Adversary, who are, perhaps, Persons of great Credit, and good Fame, and altogether unknown to the Party who propounds these Exceptions. From which special *Proctor*, neither the aforesaid Oath

can be required, nor can it be taken by him, (with a safe Conscience at least) because he knew not the Witnesses; neither have these said Witnesses any Action of Defamation against this special Proctor, because he cannot pay Charges, nor hath no certain Habitation: Therefore, to remedy this, the Office of the Judge is to be implored in these Cases by the Proctor, against whom the said Exceptions are propounded, to deny Audience to the said special Proctor, and, for the Causes aforesaid, to reject the said Exceptions, unless some substantial and convenient Person, or the Party himself (who is in Suit) come instructed in the said Cause; from which Party, not only the said Oath (That he propounds not these Exceptions, with intent unjustly to defer the Suit) may be requested, but also an Action of Defamation may be instituted against him, if he fails in the Proof of these Exceptions so given in by him. But whether or no, for the rejecting the said Exceptions, (so given in, as above, by the special Proctor) there is not given to the Party propounding those Exceptions a just Cause of Appeal, enquire of the Learned. I have often seen (saith Mr. *Clarke*) the said Exceptions rejected, when they were so offered by a special Proctor; but I never saw any Appeal interposed upon such Rejection.

7. That the Witnesses may commence Suit against the Party propounding, and giving in these Defamatory Actions, as what Mr. *Clarke* hath even now been speaking, and is not doubted: The particular Form of Proceeding upon such Defamation, will be discours'd afterward.

8. To these Exceptions of the Defendant against the Plaintiff, his Probatory Witness, succeeds next the Plaintiff his Reply against the Defendant's Exceptive Witnesses. Now though the Plaintiff has produced Witnesses, to Corroborate the Sayings and Depositions of his Probatory Witnesses, and has got their Depositions published; yet may he, at any time before the Cause is concluded, propound Exceptions, as well against the Sayings, as the Persons of the Defendant's Exceptive or Reprobatory Witnesses, (notwithstanding that the Defendant has got the Depositions of his said Witnesses published) and may obtain a Term to prove these his Replies against the said Exceptive Witnesses; with

with Limitation, That he cannot Reply or Except against the said Reprobatory Witnesses Depositions, unless he add in this Reply, That they were suborned, and corrupted to depose so, as they have deposed in their Depositions is contained, (which Words of their Depositions ought to be recited Word by Word;) for if this Quality of their Subornation is not added, that Allegation is directly contrary to the Depositions of the said Witnesses, and ought not to be admitted: But it is otherways, if the Defendant in the aforesaid Exceptions doth alledge in general, That such a Witness of the Plaintiff did commit Adultery with such a Woman named in the Exceptions, no certain Time being expressed; or perhaps (as is sometimes alledged) in such Years, (reciting divers Years) or in some one of them; and the Witnesses of the said Defendant do depose, That the said Witness of the Plaintiff in such a Year, or such a Day or Month of the said Year, committed Adultery, or was taken in Adultery with such a Woman; in this Case, the Plaintiff may (after the Depositions of the Witnesses of the said Defendant are published) alledge directly contrary, and object Perjury to the said Witnesses of the Defendant, nor is he bound to alledge the Corruption of the said Witnesses; because in this Case, the Plaintiff (before such Publications of the Witnesses) could not foresee how to purge the Innocence of his Probatory-Witnesses from such a Crime objected, by reason of such generality of the aforesaid Allegation. But observe also, That the Defendant may desire, that the Plaintiff (who propounds and alledgeth this Corruption of the Witnesses) do swear, That he believes he can prove the Subornation aforesaid, or otherways the said Replies or Exceptions against the Depositions of the Witnesses of the Defendant are not to be admitted, unless in the Case above-mentioned in this Number: But let us admit this Oath to be taken, as to the Corruption of the Witnesses, and that the Party alledging the same do not prove the Corruption of the Witnesses as is alledged, but doth prove directly, that the said Witnesses have deposed falsely, and are perjured; Whether or no, in this Case, ought the Plaintiff to suffer the Law, not having proved the Subornation also as he alledged? I think not, (saith Mr. Clarke)

because

because a Falsity in their Depositions being proved, a Corruption may easily be presumed: At least I have known it so adjudged. We need not trouble you again, to tell you what a Replication is, seeing at the same instant, when we define and shew what an Exception is, we also shew what a Replication, &c. is.

9. Now if the Plaintiff produce Witnesses to prove his Libel, the Defendant may except against the Depositions, as well as the Persons of the said Witnesses of the Plaintiff; and these Witnesses of the Defendant are called Reprobatory Witnesses, or Witnesses reproving the Probatory Witnesses; against these Reprobatory Witnesses, the Plaintiff may also except by way of Replication, and that both against their Persons and Depositions; and these Witnesses are called Witnesses reproving the Reprobatory Witnesses of the Defendant, produced against the Plaintiff his Probatory † Witnesses. If the Plaintiff hath not corroborated the Sayings and Persons of his Corroboratory Witnesses, whether produced by him in the first or second Place, he may (with the said Exceptions, which he gives in against the Defendant's Reprobatory Witnesses, or immediately after the said Exceptions are given in) corroborate the Sayings and Persons of his Probatory Witnesses; but the Defendant is forbid to except against these Reprobatory Witnesses produced by the Plaintiff: Which sort of Practice is prohibited by that general Rule, *In testem testes, & in hos, et non datur ultra.* * Yet the Defendant may corroborate

† *Lanfr. de test.*
n. 49. &c.

the Sayings and Depositions of the Witnesses produced on his Part, upon the Exceptions or Reproofs given in by him against the Probatory Witnesses of the Plaintiff, so as he do it before the Publication of the Depositions of the Witnesses produced by the Plaintiff, upon his Replies to the Defendant's Exceptions aforesaid; at least (saith Mr. Clarke) we have seen it so practised. And though *Alciatus* in *T. de test. Sect. de testium publicatione*; *Wesemb.* in *ff. T. de test. n. 5.* 13; *Lanfranc. de test. dep. n. 40*; seem all of them to conclude that four Delays are not permitted, without some special Solemnity, or Favour of the Law; yet *Lanfranc* at the fortieth Number of the said Chapter hath these Words afterwards; (*Scil.*) *Non Intelligo tamen de dilatione in presenti*

* *De hisce productionibus, plane tractatur & Lanfr. ubi supra, n. 49. Et autem utraque pars producat testes probatorios, tunc utraque parti conceduntur 3. et dilatione,*

materia, prout verbum sonat, sed pro examinatione; licet quadrina examinatio concedatur sine aliqua causæ cognitione, & quarta. So that he seems not to contradict by this, what *Mynsinger* and others affirm, (*Scil.*) That the Parties may except against each other in these peremptory and perpetual Exceptions, even until a *Quadruplication*. At the Forty ninth Number afore quoted, *Lanfranc* speaks fully to the Matter, when he says, That if both Parties produce Probatory Witnesses, (that is, such as are intended, only to prove the Matter they give in to Court, and not to reprove the Witnesses of their Adversary) then each Party is permitted to have three Delays. Which is thus: The Plaintiff hath one to prove his Libel or first Matter; the Defendant a Time to accept: The Plaintiff another for his Reply to those Exceptions; the Defendant another Time for his Duplication or Double Plea: The Plaintiff another for his Triplication; and then the Defendant another Time for Quadruplication †.

† De hisce latius videas apud *Myns. Inst. Tit. de Exceptionibus & Replic. per tot.*

S E C T. 7.

Of another sort of Proof, which is made by Instrument.

1. *What Instruments are.*
2. *How manifold Instruments may be said to be.*
3. *When they may be exhibited.*
4. *The Manner of exhibiting these Instruments.*
5. *The Protestation of the Proctor of the adverse Party, at the Time of exhibiting these Instruments.*
6. *The Manner of getting a Term assigned to propound Acts, &c. in order to a Conclusion.*

I. **H**AVING shewn above, the Order and Manner of Proof to be made *Viva voce*, Order requires we come next to shew the Order and Manner of Proof to be made *Mortua voce*, which is done by Instruments: And these are said to be Writings made upon Matters or Things to be done amongst Men. More strictly taken, they are Tables

of Writings whereby we make known, or prove, our Intention before the Judge. More largely taken, they are said to comprehend all those Things wherewith the Cause is instituted or construed, † in which Signification Witnesses are also contained.

† *Ummius disputatio. 17.*

Thef. 1. n. 2.

mf. de Inst. prod. n. 2, 3, 4, 5. Alciat. cod. tit. f. 153. Wesemb. ff. T. de fide Inst. n. 1. r. in pract. de form. Instrum. ad verb. exhiberi.

2. The Instruments are for the most part Twofold, (*Scil.*) either Publick or Private.

1. An Instrument drawn under the Hand of a Notary Publick, or other publick Person, either in or out of Court.

2. That which is sealed with some Publick or Authentick Seal, (though writ by a private) as of a Prince, City, University, or College.

* *Wesemb. ubi supra, n. 2. schurff. consil. 7. & 29. cent. 1.*

3. All Writings whatsoever (tho' private) which are exemplified by the Authority of the Judge or Magistrate.

Ferra. in forma prod. Instrum. ad verb. exhibens n. 5. Lanf. ubi supra, n. 9.

4. All such Writings as are taken out of publick Registries, &c. or those made at the publick Act.

Alciat. etiam ubi supra fol. 155.

5. Those Writings which are subscribed by the Person and Witnesses. And this is publick, as to its Effects.

Publick * Instruments are those which are made by publick Persons. And of these, there are many Sorts; Five of which are commonly observed:

Private Instruments are such as are made without any solemnity; and they are, either

Accounts.

Private Inventories or Registers.

Private Letters betwixt one Friend and another, one Tradesman and another.

These Instruments may be exhibited, both before and Publication of the Witnesses, before it be concluded in the Cause; but after it is concluded in the Cause, † they

† *Alciat. de Inst. editione. Sect. quando sint exhib. fol. 134.*

are not to be exhibited, unless some new Matter arise which hath Dependence upon the former.

4. The Proctor who exhibits these Instruments, must acquaint the Judge, that as a further Supply of the Proof of his Libel, or other Matter or Allegation, &c. he doth exhibit certain Indentures, or such a Writing, beginning thus, (here he must mention the first Line of the said Writing) and ending thus, (here he must mention four or six Words at the End of the same) and alledge, That these Exhibits are subscribed and sealed with the Hands and Seals mentioned in the same, and that they were given and delivered by the Person or Persons therein named, as their own proper Act: And further, That the Contents thereof are true, and were acted and done as is therein contained: Which Allegation (having so made or put jointly and severally) he must desire may be admitted, and that Right and Justice may be administered to him and his Client. Which being admitted by the Judge, and repeated in full force by the Party propounding the same, and the Judge, the Proctor exhibiting the said Instruments ought to swear that he hath faithfully put this Allegation and the Exhibits; and then desire the Proctor of the adverse Party to swear to make a faithful Answer to the same against the next Court-day. But if the said Exhibits are some private Writings, so that the Proctor exhibiting them doth not believe he can be relieved by the Answers of the Proctor of the adverse Party, then he must desire the Answers of the principal Party himself, as in other Causes. But observe, That if these Exhibits or Instruments are sealed with some authentical Seal, (to wit the Great Seal of *England*, or of some Bishop, or Ecclesiastical Judge) then the Answers of the Proctor of the adverse Party are rather to be required; because in the Cases he may be better instructed (what to believe as to the said Seals) than his Client. If the Plaintiff or Defendant has some old Manuscripts or Books, which he desires to exhibit as necessary Proofs on his Part, he must swear That he doth exhibit certain old Manuscripts or Books, beginning and so ending as above; and alledge, That they are old, and have been faithfully kept in the Custody of such a one, (*viz.* some publick Office or Person;) and then

they are such, to which great Credit is wont to be given, as well in as out of Court. Which Allegation being propounded, admitted and repeated, as before, he ought to make his Oath, &c. and desire the Oath to be taken by the Proctor of the adverse Party to answer as above, or he may desire for the principal Party as above. And observe, That if the aforesaid Manuscripts or Books are long, so that the Registers cannot get them copied without great Charges, then the Proctor must take Care to get a true Copy (of such a part of the Manuscript, as makes for his Intention and Purpose) to be writ out of it, and then exhibit them as above, adding these Words (and especially such a Clause or such Words, in such a Line of the Instrument, or in such a Leaf of the Book or Exhibit, together with a Copy of the said Clauses or Words.) And he must desire that the said Clauses or Words so writ out, may be examined with the Originals, and collated, and that such Collation being made by the Register, (of the Clauses or Sentences aforesaid, with the Originals) the said Originals may be re-delivered, and as much Faith may be given to the Copies collated, and to the Registers, as to the Registers themselves; which Petition the Judge Decrees: Yet the Party exhibiting the Premises (to the end that the Proctor of the adverse Party, or the Party himself, may see these Exhibits, and so inform themselves what they Believe or can Answer) ought to leave these Original Exhibits in the Custody of the Register, until the Proctor of the adverse Party, or the Party himself, give their Answer: And in this Case, the Party exhibiting the Premises ought only to pay the Register for registering that Clause which he took out of the Adversures or Exhibits: For it is to be noted, That no Exhibits (whereof mention is made in the Acts) ought to be re-delivered to the Party exhibiting them, unless the same be registred to perpetual Memory. Therefore let the Proctor, who exhibits the Premises take Care that he requests the Judge, to decree the said Exhibits to be re-delivered after they are registred; otherways, without the Decree of the Judge, the Register ought not, nor is he bound to re-deliver the said Exhibits, though they be registred.

5. At the Time of Exhibition of these Instruments, the Proctor of the other Party must say, That he doth dissent from the Exhibition of these pretended Exhibits, and protest as to the Nullity and Insufficiency of the said Exhibits, and alledge that the said Exhibits are private Writings and In-authenticall, and such to which no Credit ought to be given, and therefore he must desire they may be rejected; but if any Instrument be exhibited under the King's Seal, it is not safe for the Proctor so to deny it, or protest that it is a private Seal as above. And observe, That if (at the Time of Exhibition of these Instruments) the Proctor thus protesting can inform himself, either by inspecting them, or any other way, that the same do make in the least for his Client, the said Proctor ought then to say, That he accepted these Exhibits, and the Exhibition of them, in as much as they make on his Part, but he must otherways Dissent and Protest against them, as above. Nay, it is but expedient that the Proctor of the adverse Party do accept these Exhibits of his Adversary, and the Exhibition of them, though he is altogether ignorant whether they make for his Client or not: For if it should so fall out, that they should make for his Client in any respect, and he not having accepted them, but on the contrary having alledged that they are such to which no Credit ought to be given, and having denied the Truth of them; the Party exhibiting these Instruments, may subduct them at any time before they be accepted, which he could not do if they had been accepted by his Adversary: Therefore Mr. *Clarke* concludes, That such an accepting of the Instruments is very profitable, and ought not by any means to be omitted. And therefore this may suffice to have said of Proofs.

6. Now if the Defendant, like a Subterfuge, endeavours by Delays to defer the Cause, (which is a Thing frequently done by Defendants) and will not propound his Defensive Matters all at once, but now one, now another, (*viz.*) now his Exceptions, and then his Matter of Defence; which Delays the Proctor of the Plaintiff may avoid, and prevent thus: So soon as the Defendant has given in one Matter, and his Term Probatory is elapsed; or whilst this Term Probatory doth depend, or when it is so elapsed; doth after-ward

ward give in another Matter; the Proctor of the Plaintiff must alledge to the Judge, That N. the Defendant hath propounded a certain Matter, and has had a Term Probatory assigned him to prove the same, which is elapsed, and that now he gives in another Matter to protract the Suit: Wherefore, that these Suits may be brought to a Conclusion, he must desire that the Judge will assign the said Defendant a competent Term to propound all Acts which consist in such a Fact, (*viz.*) Two or three Court-days next following, according to the Quality and Weightiness of the Cause; which Request the Judge grants. And if on that Day so assigned, or before, the Defendant doth not propound all his defensive Pleas, he cannot alledge † or propound any thing afterwards, nor ask a Term-Probatory upon them, at least as to Witnesses, unless some emergent Cause fall out betwixt the Day wherein this Assignment was made to propound all Acts, &c. and the Day which was so assigned for this purpose: That is, unless the Plaintiff give in some Allegation of Defence, or Exceptive Matter against the Witnesses of his Adversary, or because this Term (so assigned to propound all Acts) depending, the Cause by mutual Consent of the Parties, doth stand an Arbitration as it were, or because some other necessary Defence came to the Knowledge of the Party, after the Day assigned to propound all Acts was elapsed; for then in these or the like Cases, it is lawful for the Defendant to Reply, * and propound a contrary Matter, notwithstanding the said Assignment to propound all Acts, &c. In like manner also the Plaintiff hath propounded one Matter, and the Term being elapsed which is assigned to prove such Matter, he gives also another Matter; the Defendant may likewise, in this Case, desire a Term may be assigned to the Plaintiff, to propound all Things which are further to be done; which Request the Judge likewise grants. And generally in a Matrimonial Cause, (which is the most favourable and privileged Cause of all others) the said Assignment to propound, and prove all Acts, doth not hinder, but that Defensive Matters may be propounded, and Witnesses may be produced, as is observed afterward, where it's spoke of producing Witnesses in Matrimonial Causes.

† De hac materia vide Lanf. ubi plenius notatur in c. sepe, n. 43, 44, 46. ubi datus est terminus per judicem ad producendum instrumenta, post terminum non possunt produci de rigore juris, licet de equitate produci possint, dummodo producens non fuerit in negligentia durante termino, puta, quia ignorat, &c. ita certe potest intelligi de test.

* Vide quæ supradicitur in fine Sect. precedent. & in marg. de Exception. & Replicat.

C H A P. V.

Of the CONCLUSION, or concluding in Causes; its Manner and Form; and the Things Preparatory in order to it.

S E C T. I.

Of the Term which is assigned to propound all Acts, in order to this Conclusion.

1. *The Things Preparatory to Conclusion, what they are, and how done.*
2. *What the Term assigned to propound all Acts is; and what Acts may be done on this Day, so as to rescind the Conclusion.*
3. *Witnesses may be admitted or rejected on this Day assigned to propound all Acts, &c.*
4. *The Suppletory Oath what it is, and when and in what Form administred.*
5. *The Manner of propounding and invoking all Acts, &c. and desiring a Term to be assigned to conclude.*
6. *What Act induceth a Conclusion, and how the Defendant may hinder it on this Day.*

1. **P**ublication of the Witnesses being made, the Plaintiff (in Summary Causes) must desire a Term to be assigned to hear Sentence: And in Plenary Causes he must desire a Term to be assigned to propound all Acts, &c. in order to a Conclusion in the Cause: Which the Judge accordingly doth. Then the Defendant, if he believes it necessary for his Client to use Exceptions against the Witnesses of his Adversary, or any contrary Defence, he ought to dissent from this Assignment, &c.

2. Now this Term to propound all Acts, (as Mr. Clarke has been informed) is not named in the whole Body of the Law,

Law, * and it is said to be rather a Term of the Judge, than of the Law, to take away the Delays; the Defendant may (on that Day so assigned to propound all Acts in Plenary Causes, and to hear Sentence in Summary Causes) give in any Exceptions, or Defensive Matter, or he may add to those which are formerly given in on his Part, if any such be, and declare them by way of Positions Additional: By the Admission of which, or the Assignment to hear the Pleasure of the Judge upon the Admission thereof, the Conclusion is rescinded; at least if these Exceptions or this Matter were admitted afterward, though also on the same Day assigned to propound all Acts, or to hear the Sentence, the Cause were not continued in the same State wherein it then was until the next Court-day. Yet observe, That though Positions Additional be so admitted, yet another or new Day is not to be given wherein to prove the same, if another Term-Probatory was before given to prove that said Matter, to which these are as it were Declaratory; but these Positions Additional or Declaratory, are to be proved within that Term so already given.

* *Publicatione facta, si transacto termino, nihil detur contra testes, terminus dari consuevit ad producendum omnia Instrum. Acta & Munita. Ita Alciatus, de test. f. 150. Lanfr. de Caus. Deleg. & Sum. c. Saep. n. 43, 44.*

3. Also if on this Day, thus assigned to propound all Acts in Plenary Causes, and to hear Sentence in Summary Causes, either the Plaintiff or Defendant have any necessary Witnesses present in Court, and do make Oath, (as was said before) that they are Witnesses necessary on his Part, the Judge may Admit, Swear, and Examine them, although the other Party may object, that the Matter cannot longer be said to be *res integra*, or Whole, and that the Law or Right hath acquiesce on his Part, by reason of the said Assignment to propound all Acts in Plenary Causes, and to hear Sentence in Summary Causes. And this Allegation is to be propounded and objected, by the Proctor of the adverse Party, when the Witnesses are produced in this Case; yet it is left to the Breast of the Judge, Whether he will admit or reject these Witnesses, and neither Party hath any just Cause of Appeal. This Mr. Clarke saith, he has obtained in Court of Controversy forty Years ago.

4. Sometimes it so falls out, that there is not such full proof made as by Law ought to be; therefore in this Case, in this part of the Proceedings, the Oath, called the Suppletory

† Ponitur & solvitur hæc Questio ab Arnoldo Vinnio in scilicet juris 99. l. 1. c. 43. Sect. nimirum par-tia. Gail. 1. obs. 108. n. 3. & seq. de verb. signif. verbum Juramentum Myns. Inst. de Actiō. Item. §. 3. in. & 86. obs. lib. 1. obs. * De hisce etiam vide Alciat. de Jurament. f. 158. de Act. Sect. Item si quis n. 3. 4. Myns. Inst. † Alciat. ubi supra, fol. 159. Sect. Procurat. in tribus casibus potest deferre Juramentum.

† Hi casus enumerantur ab Alciato ubi supra, fol. 159. vando. n. 10.

pletory Oath, is wont to be administred. This Oath is properly called the *Juramentum necessarium*, the necessary Oath, which (when there is a want of full Proof) the Judge upon knowledge of the Cause (tho' the Parties request it not †) may administer to either the Plaintiff or Defendant. And this necessary Oath is divided into Suppletory (to which this Definition now given doth agree) and Purgatory; which Oath the Judge (the Cause being known) may impose upon him, against whom the Presumptions seem chiefly to make, &c. Now when there is either nothing, or the whole Matter, proved, then there needs not this Oath to be administred; when there is but half Proof, then this Oath ought to be administred, either to the Plaintiff or Defendant, at the Pleasure of the Judge; * when the Plaintiff hath one Proof, and the Defendant one, then this Oath ought rather to be administred to the Defendant, seeing we ought rather to incline to Mercy than Judgment. Wherefore if the Plaintiff has not only proved, but yet has made somewhat more than half, or only half proved his Intention, he may appear before the Judge under the Form following, and taking the following Oath, (for his Proctor † cannot take this Oath, having no special Authority to do it in his general Mandate.) I N. without the least Intention of revoking my Proctor, do alledge, That I have more than half, or half proved (at least) my Intention in such a Libel, &c. Allegation, or other Matter, referring me to the Acts of Court, and to the Law; and therefore I desire that the Suppletory Oath may be administred to me, and that Right and Justice may be done. Then the Proctor of the adverse Party must deny these Things so alledged to be true, and protest as to the Nullity thereof, and alledge, That this Oath ought not to be taken, referring himself to the Laws. Then the Judge will assign to hear his Pleasure upon this Petition, and to receive Informations thereupon: And if it do appear, that those Things are true which are alledged by the Party who desires this Oath, (that is, that he hath proved his Intention more than half, or half at least) then this Oath is wont to be administred, † in such Cases as the Law permits: Therefore consult the Learned what these

Sect. in Juramenti dilatione 4. Spectanda. Wesemb. etiam in ff. de jure ju-lit. Ep. 646.

Cases

Cases are, in which this Oath ought to be administred. The Party taking this Oath, must swear, That to his certain Knowledge those Things are true, upon which he desires so to be sworn. And this Oath ought to be administred before the Cause is concluded; and if it is not administred then, it ought to be requested again after the Cause is concluded; or in this Case, the Judge may administer this Oath either before or after the Conclusion of the Cause; but not unless it were so desired before. Likewise if the adverse Party do prove, that the Party who desires this Supplicatory Oath is infamous, Vicious, and of no Reputation or Estimation, then this Oath ought not to be administred in any Case.

* *Alciat. ubi sup. fol. 159. Qualitas personarum consideranda, Wesemb. ubi supra, n. 10. in fine. Jason. in l. penult. Sect. hoc Judicium, nisi rei persona*

6. ff. *nequis cum qui Bartol. in dict. l. admonend. Chilian. in pract. c. 66. legalior, vel actor veritatem ignorare putetur.*

5. Also on this Day thus assigned to propound and invoke all Acts, &c. the Proctor, who hopes to obtain Sentence in the Cause, must say in Court, That he doth there exhibit all the Acts or Things inacted, brought into Court, alledged, propounded and exhibited, proved and confessed, in that Cause, so far as they make on his Part, and desire that a Term may assigned to conclude against the next Court-day; and the other Party also, if he have any hopes of the Cause, he must also on the same Manner exhibit all Acts, &c. so far as they make on his Part, and let him not dissent from the Assignment to conclude; but if he despairs of the Cause, he may then dissent from the Exhibition and propounding the Acts, and from such Assignment to conclude. This Exhibition of all the Acts, and this Assignment to conclude, do induce the Conclusion in the Cause; a Conclusion is also induced, not only by the Exhibition of the Acts themselves, and the Assignment to conclude, but also when nothing at all is done on that Day so assigned to propound all Acts, as in the following Number.

6. Now the Defendant on this Day (assigned to propound all Acts, &c. in Plenary Causes, and to hear Sentence in Summary Causes) if he intends to use Exceptions against the Witnesses of his Adversary, or any contrary Defence, ought to propound his Exceptions against the Witnesses, either in general at the Act of the Court, (as they term

term it) or in Particular or *Specificè* in Writing; or he ought to give in any other Defensive Matter; for if he gives in nothing on this Day, thus appointed to propound all Acts, &c. in Plenary Causes, and to hear Sentence in Summary Causes, then is it concluded in the Cause on that Day as much as if they had exhibited and propounded all Acts, &c. nor is the Plaintiff or Defendant permitted afterwards to propound any Matter or Exceptions †.

† *Conclusum esse dicitur ubi partes renunciaver. omnes*

exceptiones, sed renunciatio per alteram partem tantum non nocet alteri. Lanfr. de except. n. 3. & de test. dep. n. 42. 41. Alciat. de renanciacione & conclusione. per tot. fol. 162.

S E C T. 2. |

Of the Term or Day appointed and set apart for this Conclusion.

1. *What a Conclusion is, and when it may be said to be concluded upon some particular Article.*
2. *The Form and Manner of the Proctors concluding and getting a Time assigned for Sentence.*
3. *What Effect such an Assignment so to hear Sentence (the adverse Party being then present, but not being admonished to be present at the Time thus assigned for Sentence) hath in Law.*
4. *The Manner of giving Informations to the Judge, in order to Sentence.*

1. **T**O conclude in the Cause, is nothing else, but to renounce all further discussing and disputing the Matter, and to submit the Controversy to the Knowledge of the Judge. Therefore the Conclusion of the Cause is a Judicial Act, whereby the Cause, or some Article of the Cause, is accounted for concluded; so that there is no room left for the Parties further Disputation. * Now it sometimes falls out that there is an Allegation † given, which concerns not the principal Business, but some other emergent Cause: E. g. *I object against the Certificate of the Citatory Mandate,*

* *Manual. Jur. de verb. sign. Roding. Pand. Camer. lib. 3. r. 36 pr.*

† *Emeric. pr. t.*

70. n. 7. quilibet

Castrensis auth.

articulus habet suam instantiam. Baldus l. 1. cod. de Juramento Calum. n. 3. in isto jur. Sect. quod observari. num. 10. cod. eod.

by Vertue whereof I was Excommunicated, that it is fictitious and false; or I alledge, That I have compounded the Cause, and produced Witnesses upon this Allegation and Publication; those Witnesses being made, I have alledged my Intention in this Allegation to be sufficiently proved, referring me to the Acts, and to the Proofs, and have desired that my Client may be absolved instantly, and the adverse Party to be condemned in Charges which are made in the Proof of the said Allegation. And the Judge, in Presence of the Proctor of the adverse Party, denying this Allegation (that is, that I have proved my Intention) by me made to be true, hath assigned to hear his Pleasure upon the next Court-day. But if on that Day, the Judge at my Petition (allegding and desiring aforesaid) do assign to hear his Pleasure upon this my Petition (as before) upon the next Court-day, in Presence of the Proctor of the other Party; then these Two Assignations, or this Second Assignation for one and the same Thing do induce a Conclusion in the Cause, as to this emergent Article; † neither is it lawful for the adverse Party to except against the said Witnesses, nor propound any thing contrary to the Allegation and Petition aforesaid.

† *Lanfr. de test. dep. n. 41. vers. Aut est facta renunciatio specialiter super uno articulo & non possint admitti probationes.*

2. On this Day which is thus appointed to conclude on, the Proctor, whose Petition it was so assigned to conclude, must acquaint the Judge, that he doth now with his Permission conclude in this Cause, and desire that he will please to grant a Conclusion therein; to whom the Judge Replies, We conclude with the Party thus concluding. Then the Plaintiff must desire that a Term may be assigned to hear Sentence against the next Court-day: Which the Judge doth grant accordingly. If the Defendant is dissident of the Cause, he may dissent from this Conclusion and Assignation aforesaid: But if otherways, then he may conclude with the Party, and the Judge so concluding, and let him not dissent from this Assignation to hear Sentence. The Premises may be done and requested by the Proctor of the adverse Party, though this Term for the Conclusion were not assigned at his Petition; for sometimes the Party desiring to propound all Acts, &c. or to conclude, doth not intend to take further or other Council in the Cause, i. e. the Council of an Advocate. What Mr. Clarke means by this,

this, I well know not, I refer you to his Title, *De Petitione in die assignato ad concludendum*.

3. Now if, in the Presence of the Proctor, or the principal Party himself, the Judge do assign to hear his Sentence in the Cause upon such a Day, and in such a Place, without bidding the said Party, or his Proctor, be present; yet the Premises being observed, (that is, the Contumacy of the adverse Party being accused, and he being called) Sentence may be given in Penalty of his Contumacy, if he appears not, as though the said Party, or his Proctor, had been admonished to be present to hear Sentence: For this Assignment to hear Sentence, being made in Presence of the adverse Party, hath the same Force and Effect, as if he had been so admonished to hear Sentence; yet, because an abounding Cautele cannot do harm, and that this Dispute or Objection may be removed, it is not amiss to admonish the Proctor of the adverse Party, or the Party himself, to be present to hear Sentence as above. And here it is to be noted, That if, on the said Day so assigned to hear Sentence, the Judge, being not fully informed, doth not pronounce the Sentence, the Party, at whose Petition the Term to hear Sentence was so assigned, cannot desire the Judge to assign another Day to hear Sentence, in Penalty of the Contempt of the Proctor of the said adverse Party, or the Party himself if they are absent, because the aforesaid Party, or his Proctor, were not admonished to any other Act or Effect than to hear Sentence given in the Cause, and therefore they are not Contumacious as to any other Effect: In this Case therefore it is convenient that the aforesaid Proctor, or Party, be admonished to be present, not only to hear Sentence, but to see all further Proceedings to be done inclusively, until Sentence be pronounced in the Cause.

4. The Cause being now concluded, and all Things in readiness for Sentence, it is requisite that, at the Time of this Conclusion, the Proctors desire a Time may be assigned to inform the Judge, as well in Matter of Fact as the Law, on both Parts; but this Day of Information is to be on some Day on which no Court is kept, and in the Chamber of the Judge or Advocates, [in the Consistory in some Places]

At these Informations, the Proctors who are fee'd in the Cause are wont also to be present, that they may be ready to acquaint the Advocates what Acts have been done in the Cause: For in those Things they are more expert and more conversant than the Advocates, not only because all Acts of Court are drawn by them, but also because those Acts are wont to be writ in a Book, kept by them for the same purpose particularly; though sometimes, in very weighty Causes, the Advocates are wont to draw the Acts. The Order at their Informations is this: The Advocate of the Plaintiff, in the Presence of the Advocate of the Defendant, must first read the Libel to the Judge, who compendiously writes down the Effects of it; then he reads the Answer of the principal Party to that Libel, which the Judge also abbreviates; and if the Intention of the Plaintiff is not sufficiently proved by these Answers, then the Depositions of the Witnesses are to be read. Then the Advocate of the other Party must be heard, who must also read the Matter of Defence, and all the Proofs on his Part. Which being done, the Advocates are wont to inform what Questions of Law arise from the Matter of Fact, proved on both parts; and if the Advocates cannot agree betwixt themselves, as to these Questions so moved by them, the Judge in that behalf is wont to interpose his Opinion, and appoint what and which Questions of Law they shall dispute upon: and for the discussing and arguing these Questions of Law, and also the Matter of Fact, or the Merits of the Cause, many Days are wont to be assigned, before the Judge is fully satisfied in the Matter: All which Proceedings the Judge is wont to write down in short, for his Memory sake. *Sciatus* † has spoken so fully and accurately, as to the manner of the Advocates making their Observations upon the Proofs, their manner of Disputing and Alledging, and the Office of the Judge, upon such Disputations and Allegations, that I think it not amiss to refer the Reader thither, being especially useful for the Learned Civilian.

† *De test. fol. 150. Sect. De Rubric. & de disput. & Allegatione 5. Advocat. afo 160. ad fol. 162. Sect. Officium*

Jud. Allegationis audientes, & Sect. De consilii requisitione.

CHAP. VI.

OF SENTENCE in these Plenary Causes.

SECT. I.

1. *What it is in General, and how manifold.*
2. *What an Interlocutory Sentence or Decree is, and when it hath the Force of a Definitive Sentence.*
3. *In what Form the Sentence ought to be drawn, that is, whether and when it ought to specify a particular and certain Things, and when not.*
4. *The Form, Time and Place, of pronouncing Sentence in Presence of the adverse Party, and his Protestation to Appeal.*
5. *The Manner of pronouncing Sentence in Penalty of the Contempt of the Defendant, or his Proctor.*
6. *The Manner of offering and pronouncing two Sentences And the Manner of compounding the Charges *.*

* *Quando expensarum mutua fiat compensatio vide Lanf. de expens. n. 12.*

1. **T**He whole Business of Suit being dispatched in manner as above, and Informations, a Conclusion, and Deliberation being had in the Matter, it remains that the Parties desire Sentence to be given in the Cause. Now this is said to be the Third Part of the Proceedings, and is called *Terminative* or *Definitive*. The Name of Sentence is usually taken for the Opinion or Apprehension of any one hath of a Thing. Or oftentimes, in a Court of Judicature, it is taken improperly for a Decision of a Matter in Controversy; and in this Case an Arbitrator may be said to give Sentence, and a Decree may also be said to be a Sentence. But properly a Sentence is taken for a Decision (of any Thing in Controversy) made by the Judge alone; and then the Pronunciation or Determination of the Arbitrator (which is called an Arbitration, &c.) is rather opposite to a Sentence: Therefore a Sentence may be said to be Twofold, (though *Alciatus* numbers Four Sorts of Judicial Sentences) the one Interlocutory

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itory †, (which is a large Acceptation of the Word) the other Definitive (which is a strict Acceptation of it, & *κατ'* according to the Eminence of it,) being that which terminates, and puts an End to the principal Cause.

† Wesemb. tit. ff. de re jud. n. 3 & 4. Bachov. ad Wesemb. de re jud. n. 4. de Hahn. ad Wesemb. ibid. n. 3. Jason. in l. nequicquam. Sect. ubi decretum de officio procons. gloss. in clem. 1. verb. definit. de sequest. pos. Rosbach. in process. civil. tit. 71. n. 8. usque 16. Maran. in suo Specul. in 3 part. 6. part. abs. 1. de senten. n. 3.

2. An Interlocutory Sentence or Decree, is that which is pronounced betwixt the beginning and ending of the Cause; not upon the principal Cause, but upon some incident or emergent Questions, (*Scil.*) upon the Libel, its Admittance or Amendment upon any Delay that is to be given or denied, and the like. Now this Interlocutory Decree is said to have the Vertue of a Definitive Sentence, when it is final, and that there is no hopes of another Sentence, * or other Decree, upon that Article, Thing or Cause; but it doth put an End to that Thing, about which that Interlocutory speech was so made: (To wit, a peremptory Exception is given to hinder the Proceedings; or I have alledged that the Proceedings are retarded, and I have therefore desired Charges for the Proceedings being so retarded; and the Judge hath rejected this Petition. Likewise an Exception is given in the Name of an Excommunicate Person, against the Certificate by which he was unjustly Excommunicate, which Objection he proveth, and desireth his Absolution without Contumacy Fees, and his Adversary to be condemned in Charges: Yet the Judge pronounceth that the Party hath not proved, but hath failed in the Proof of the said Objections, or at least (being often requested to condemn the adverse Party in Charges upon this Article of Objection against the said Certificate) doth expressly refuse, or tacitly, by proceeding to other Things contrary to this Petition; to these Cases or Articles, there is no hopes of another Sentence, therefore the said Sentence or Interlocutory Decree hath the Force or Vertue of a Definitive Sentence.

3. *Justinian* says, That the Judge † ought, as much as is possible, to pronounce Sentence upon a certain Sum of money, or upon a certain Thing, though the Matter be moved before him for an incertain Quantity. From which text, *Mynsinger* gathers Two Opinions; The First is, That

* *Offo enumerantur Casus in quibus hac sententia interlocutoria dicitur habere vim sententiae definitivae; de quibus vide Rosbach. in procur. Jud. civil. 71. n. 6. & Lancellos. tit. de sententia. n. 2. in fine. n. 3. Myns. observ. cameral. cent. 3. obs. 38. Maranta. p. 6. tit. de senten. n. 42. Julius Magenhorst. in comment. super ord. cameral. part. 2. c. 28. Roding. pand. cam. l. 1. tit. 19.*

† *Inst. de Action. Sect. curare actionem. per tot.*

the Judge ought to pronounce a certain Sentence; the other is, that an incertain Petition of the Plaintiff ought to be tolerated. As to the First, there is this Rule, *Quod quisque iudex necessitate astringatur, sententiam ferre certam, etiam si actum sit, super quantitate incerta*; and this is intimated by the Word *ought*, which signifies a Necessity: Likewise the Word *Omnino*, in the Text, or *Omnimodo*, as some will have it, which is so Intensive and General, that it comprehends every Cause; nay, Reason it self requires it so to be; for otherways, Suits would rather be multiplied, than taken away (by such incertain Pronunciations) after so much Labour and Cost made by the Parties in Suit. But doth not this repugn that common Rule, which says, That the Sentence ought to be conformable to the Libel, nor ought it to contain any Thing other than what is desired: For if from an uncertain Action or Libel a certain Sentence is pronounced, it necessarily follows, that the Sentence doth differ from the Libel? I answer, That Incertain and Certain are Qualities, which make no Deformity betwixt the Libel and the Sentence. Nor doth the aforesaid Rule alway take Place; for there are many Species of Facts, in which the Incoherence of the Libel (or Petition) and the Sentence, are permitted. This Rule takes no Place in Criminal Causes, in which there needs no Conclusion; and if there be a Conclusion, yet the Judge hath Power to condemn (more or less) by his Sentence the Quality of the Crime, and Persons being known †. Likewise the Judge, in Civil Cause, (as to the Qualities, the Times, the Manners, the Places,) needs not follow the Petition of the Libel. For what if a Condemnation being desired, and it appears by the Acts, that a Condemnation ought not to be made, and therefore the Judge absolves the Defendant? Now in this, the Sentence differs from the Libel only as to the Qualities of condemning or absolving: Wherefore *Baldus* very elegantly saith, That it is sufficient, if the Sentence * agrees with the Libel in the Thing, the Cause, and the Action (Scil.) First in the Thing asked in the Libel; That the Judge do not pronounce Sentence upon any other Thing than that Thing so asked in the Libel. Then in the Cause of asking That the Judge do not pretend any other Cause; as if the Plaintiff

† *Bart. in l. quid ergo. 13. Sect. pena gravior. ff. de his que nota. inf. obs. Myns. Cam. cent. 4. obs. 81.*

* *Hicse consentiunt quæ à Lanfr. dicuntur de interloc. & appell. n. 16.*

Plaintiff do desire what he sueth for upon the Account, or for the Cause of a Loan, and the Judge, pursuant to that Cause, doth so pronounce the Sentence. Also in the Action; that the Judge follow the Action instituted by the Plaintiff, either by condemning or absolving. Yea, the Judge may modify the Libel, though it be not desired. Also, if in the beginning the Plaintiff ask a lesser Quantity, and then in the progress of the Cause he prove a greater; yet, nevertheless, the Sentence shall avail, though it contain a greater Quantity than the Libel: For the Judge ought to follow the Verity of the Proof, which probably, at the beginning of the Suit, neither he nor the Plaintiff knew. Also if the Plaintiff ask Five, and the Defendant confesseth that he owes Ten; the Judge may, yea he ought to condemn the Defendant in Ten: For this disagreeing of the Libel (or Petition) and the Sentence, is tolerated by the Confession of the Defendant who is convened. And Lastly, Sentence may be pronounced upon Things that are not requested in the Libel; so as the said Things be of the Nature of those Things which are asked, or Correlatives, or Correspondents with them, or are otherways emanant or proceeding from the same Fountain. *v. g.* You desire in your Libel or Declaration Five Marks of Silver, and the Judge pronounceth Sentence for Three Pounds Six Shillings Eight Pence; in this Case the Sentence is valid, because Three Pounds Six Shillings Eight Pence is the same Sum in our Account with Five Marks. Another Example is, If my Neighbour sues me for the Privilege of Watering his Cattle at my Pond or Pit, the Judge by the Sentence orders me to shut up my Pond; in this he pronounceth Sentence, that my Neighbour ought to be denied the Privilege of Watering at it. And this is it which the Practitioners usually say, That tho' the Sentence doth not comprehend the Thing desired, yet it comprehends those Things which are of the same Nature with those Things asked or sued for in the Libel. Therefore we see in these Cases, the Sentence doth supply the Defect of the Libel. By the like Reason also it oftentimes happens that an incertain Sentence is admitted. As First, If the Judge in the Sentence, refer himself to somewhat from whence the Certitude of the Sentence may be gathered:

Example; I condemn to pay the Debt, according to the obligatory Caution produced in Court, or in the Acts of Court; which is as much as if the Judge should say, Pay what thou owest: So as this Debt do appear by the Probatory Acts; such as are the Witnesses, the Instruments, the Confession, &c. but it is otherways, if the Debt appear only by the Assertory Acts, (to wit) because the Plaintiff affirms in his Libel or Positions, That such a Debt is due to him, but doth not prove it. So in a Cause of Damage, an incertain Sentence and Condemnation, is admitted on this manner: I Condemn *Mævius* to pay to *Titius* Ten Nobles, or to owe Damage, &c. besides, in the Petition of an Inheritance, [or Personal Estate], an incertain Sentence doth avail; for the Judge may pronounce, That all ought to be restored, whatsoever belongs to that Estate, and is in the Custody of the Possessor: Which is true, if it be an universal Action; for as an incertain Petition, so also an incertain Sentence, is tolerated: For as if this Action were instituted for a certain Thing, it is so to be declared, and to be concluded in order to the Restitution of it: And so it is meet there be a certain Pronunciation. Lastly, He who hath promised a Horse or a Garment alternatively, is to be so condemned, that he pay either of them. To these, add other Things of the like Nature. Now *Mynsinger* comes to the other Opinion, which respects the Petition of the Plaintiff, in which Case, this Rule is to be observed; that the Libel of the Plaintiff ought not to be admitted, unless it comprise a certain Petition. Which Discourse is partly hinted at in the First Chapter of this Part, touching the altering or amending of Libels, and thither we refer the rest; only we shall abbreviate what *Mynsinger* here says, by way of Limitation to the aforesaid Rule. *First*, he says, That a general and incertain Petition is tolerated in Universal and General Actions, without specifying the Things, for it is convenient that we understand that some Actions are Universal, others General, and very many Singular or Special. We call them Universal, when we sue for some Body of the Law, containing many Things with Increase and Diminution, such as are an Inheritance, a Jurisdiction, a Dowry, a Reward, &c. Therefore an Action for an Inheritance, (or Personal

Universal
Actions.

Personal Estate) a Dowry, and a Reward, for any ones Labour, &c. are Universal Actions. General Actions are *General Actions.* said to be those, which appertain to that Thing which is General, comprehending divers Species of Things, and so consequently the whole Negotiation: Of which sort are the Tutorship or Office of a Tutor, which not only respects one Species of that Office, but in General, the whole Management of the Pupil's Patrimony: So also Society, Stewardship, and the like. Therefore an Action against a Tutor for his Tutorship, against a Fellow-Tradefman, or Merchant, &c. against a Steward, or others intrusted to manage any Man's Business, are General Actions. Singular or Special Actions are those, whereby we are said to prosecute *Singular Actions.* that which of its own Nature (and so far as appertains to the Interpretation of the Law) is Special, though it may have some Accessaries; and of this sort are a Horse, a Garment, a House, and such-like Things: Therefore an Action about a Mandate, or Letter of Attorney, a thing Lent, Pawned, and the like, are Special Actions. *Secondly*, The Incertainty of the Libel is permitted, if the Incertitude happen by the Fact of the Adversary, as is in an alternative Obligation, where the Election or Choice belongs to the Debtor. *Thirdly*, If the Incertitude of the Libel happen by reason of the Thing desired, as when it is sued for some Fact, when the Facts are uncertain. *Fourthly*, The Incertitude of the Libel is permitted, if any Thing that is accessory is sued for, to wit, Profits or Charges, as when I sue for such Land, with the Profits, &c. *Fifthly*, A general and uncertain Libel is tolerated, so far as the Matter respects the breaking of a Prescription. *Sixthly*, A general and uncertain Libel concludes, if the Proofs made in the Proceedings are certain and specifick. *Lastly*, The aforesaid Rule is true, if the Adversary do oppose the Incertitude of the Libel or Declaration; but if he doth not so oppose it, the Libel takes place, though it be so uncertain*. But these Exceptions to the aforesaid Rule, are to be understood as to Civil Causes only; for in Criminal Causes, an obscure or general Libel is of no Effect. Thus from what *Mynsinger* says, touching the Incertainty of the Libel, we may in the like Cases infer the Incertainty of the Sentence may take place. * *Gail. pract. obser. lib. 1. ob. 62. n. 11*

* De forma judicandi. Vide Wesemb. ff. de rejudicata. n. 7. Alciat. de Sent. per tot. Plura reperias observatu digna in Scriptis ferend. est. Lan. de interlic. & appel. n. 8 qua forma, n. 9. 12. ubi ferend. 17. coram quo, n. 18, 19, 20.

4. The Proctor who hopes to obtain * Sentence in the Cause, must get it drawn in Writing against the Day which is assigned for Sentence, and must give it to the Judge, saying, I desire Sentence may be given, and that Justice may be done on my Part; but in the Courts of the Arches, it hath been long observed, That the Writers of the Acts of Court (by the Instruction given him from the Advocates or Proctors) are wont to draw the Sentences; and the Sentence being given, the Judge, if he intends to pronounce the same, must read it until he come at these Words, [But the part of *N. viz.* the Party against whom he is to pronounce the Sentence] and then he is wont to ask the said Party what he will say or ask, who is commonly wont to Reply, I desire that Justice may be done. Which Word *Justice*, (if it should chance to be disputable about the Sentence pronounced, (*viz.*) whether the Judge pronounced this, or some other) the Judge is wont (with his own Hand) to insert into the Sentence, that so by finding that Word (*Justice*) so, of his own Hand-writing, he may easily decide the Controversy; for in every Sentence to be pronounced, a Place or Space is usually left for the inserting of that Word: Which being so inserted into the Sentence, the Judge then proceeds to read the Sentence forward: Which being read, he, for whom the same is so pronounced, returns the Judge a grateful Acknowledgment for his Justice, and then he requires the Notary Publick, that is, the Writer of the Acts, to draw up a publick Instrument upon the Pronunciation of this Sentence, and that the Witnesses there present may give their Testimony upon it; and the Notary ought (in the Act which is drawn upon the Prolation of this Sentence) to insert the Names and Surnames of the Witnesses, who are present at the Time of pronouncing the same. But the Party against whom Sentence is given, if he doth not intend to appear judicially, or at the Acts of Court, may afterward, before a Notary, say in Writing, I dissent from the Prolation of this Sentence, and I protest as to the Nullity of it, and of a Grievance, and of Appealing from the same within the Time allowed by the Law, of which Appeals is spoken fully afterward.

5. Conclusion

5. Conclusion being made in the Cause, and Informations given to the Judge, as is aforesaid, as well in Matter of Fact, as Matter of Law, and the Judge intended to determine the Suit by Sentence, hath assigned a certain Day to hear the same; let the Proctor, who hopes to obtain Sentence, take care that the adverse Party, or his Proctor, † be admonished to be present to hear Sentence in the Cause. And if on that Day so assigned for Sentence, neither the Party nor his Proctor do appear, the Proctor who desires the Sentence must accuse the Contumacy of N. the Proctor of the adverse Party, and of the Party himself, if he (and not his Proctor) was admonished to be present upon this Day, and in this Place, to hear Sentence given in the Cause, and to see Justice done; but taking no care to be present, wherefore he must desire, that they may be reputed Contumacious, and that (in Penalty of this Contempt) Sentence may be given, and Justice may be done. Then the Judge causeth the Party and his Proctor who were admonished (as before) to be present, to be called three times with a loud Voice, and if neither of them appear, he must pronounce them Contumacious, and in Penalty of this Contempt, he decrees that they shall proceed to the pronouncing of Sentence: Then the Proctor, who desires this Sentence, must take care that the same be writ or corrected in the *Exordium* of it, on this manner, (*viz.*) The Party of the said N. (that is, the Party who desires this Sentence) being present before us, here in Court by his Proctor; but the Party of the said M. (that is, the Party absenting himself) being contumaciously absent; (whose Absence is supplied by the Presence of God, whom we Religiously invoke) the Party of the said N. desiring Sentence may be given, and that Justice may be done on his Part; all and every of the Proceedings therefore being first searched, weighed, and examined, &c. and so on, as in the usual Form of Sentences.

† *Alciat. ubi supra, Sect. conditiones sententiae, sive qualiter sit ferenda, n. 2, 3. & Wesemb. ubi supra, n. 7.*

6. If it is appealed from Grievances, (that are made before the pronouncing of Sentence) and afterwards from the Definitive Sentence, and the several Appeals, are contained in one and the same Inhibition, and are accumulated in one and the same Libel, if the Party appealing do make Default in the Proof of his Libel, as to the Grievances

* *Succumbens in
aliqua appel. est
condem. in
expens. Alciat.
de expens.
fol. 194. Sect.
de exp. in cau-
sis app. factis.*

Libellate, and hath justified his Appeal * as to the principal Cause, that is, if he hath proved that the Sentence pronounced by the Judge from whom it is appealed was Injust or Null, or contrariwise. The Judge, in these Cases, is wont to give Two Sentences, the one for the Party appealing, and the other for the Party appealed: But in case, because the Party appealing hath proved the Libel on his Part, and not in the whole Business, he shall not obtain Charges of Appeal, but a Composition of Charges is to be made; that is, because he hath appealed frivolously and unjustly, either as to the Grievances, or as to the Sentence, and seeing the Party appealed hath obtained Sentence on his Part, as to the one or the other of the Appeals; he ought also to obtain his Charges as to this Appeal: Therefore a Composition of the Charges is to be made as above. But admit that the Party appealing doth exact more or greater Charges in his Appeal from Grievances, than the Party appellate doth prove he hath been at, in justifying or confirming the Sentence of the Judge, from whom it is appealed, as to the Justness of the Cause: As for Example, The Party appealing from comminatory or threatening Words, that is, when the Judge from whom it is appealed doth threaten the Party that he will give Sentence against him, which Words do appear in the Proceedings of the Judge from whom it is appealed (which are made to the Judge to whom it is appealed) he ought to prove these Words, or otherways he shall lose his Cause. Likewise the Party appealing in a Cause of Correction, if the inferior Judge do grieve any Man before the Sentence is pronounced, or by his Sentence, or perchance after Sentence, the Party grieved in this Case, (though he might interpose his Appeal as to the Judge alone, and might prosecute the same as to him; yet out of the Reverence due to the Judge in the Appeal) he may say, That the Grievances, from which it was appealed, were laid at the Petition, the Instance, the Promotion or Intigation, of some other Person not named in the Acts of the Judge, from whom it is so appealed; and this Appeal is to be prosecuted as to this Person, and not as to the Judge; and the said Party appealing ought to prove by Witnesses, that these Grievances

were

were inflicted upon him at the Instance, Petition, Promotion or Instigation, of the said Party Appellate, or otherways he will lose his Cause of Appeal. Likewise if it be appealed from too great and excessive a Taxation of Charges, if this Excess doth not appear by the Proceedings themselves being transmitted, as often falls out, especially when the excessive Charges (as well for soliciting the Cause, as for dispatch of the Commission in remote Parts, for Examination of the Witnesses) are asked, the Party appealing is obliged to prove by Witnesses, that these Charges are excessive; in all these Cases, the Party Appellate, if he obtains Sentence for himself in a Cause of Grievance, he shall obtain, as well his ordinary Charges made in prosecuting this Appeal, as also the other Charges made in proving the aforesaid Grievances, by Witnesses upon the like Reason also, if the Party appealing do (by new Proofs, known to the Party Appellate) obtain in this Appeal, from a Definitive Sentence, and is cast in a Cause of Grievance, he shall obtain his Charges of Appeal. But it is otherways if the other Party was ignorant of those Proofs; for in that Case, for his Malice in not producing those Witnesses in the First Instance, † he is to be condemned in Charges; yet the Party Appellate shall obtain some Charges, to wit, those which he expended, by reason of the Sentence which was given on his part, (*viz.*) for the Fee of the Sentence, and the Execution thereof, and the Fees of the Advocates and Proctors, for giving Informations, and dispatching Acts in and about the said Sentence, which the Party Appellate obtained. This Mr. Clarke saith, he has known adjudged in the Appellant and the Appellate through evil Repute; for he who produced not his Witnesses in the First Instance, is of ill Repute, and not to be excused from Malice; and he who knew that his Adversary had Witnesses to prove his Intention, and yet obtained Sentence, is not to be excused of Malice, &c. when a Sentence is nulled, &c. or retracted. See *Alciat* *.

† *He expensæ inter eas numerari possint quæ veniunt ratione contumaciæ. De quibus vide Lanf. expens. a numero 22. ad finem. c. quoniam.*

* *Ubi supra ad finem ejusd. tit. de sent. & Westminster. ubi s. n. 8.*

S E C T.

S E C T. 2.

The putting the Sentence in EXECUTION, or the Claiming the Thing adjudged.

1. *How Res Judicata, or the Thing Adjudged, doth differ from a Sentence, and when it is said so to be.*
2. *After how long Time (from the pronouncing the Sentence) it ought to be demanded to Execution.*
3. *The Form of the Proctor's exhibiting his Proxy after Fifteen Days are elapsed, from the Time of pronouncing the said Sentence, and his Petition to have the same put in Execution, and to have a Citation decreed in order thereto.*
4. *How put in Execution upon the return of this Citation, and how the Charges are taxed, (if the Party pretending an Appeal is absent) and how a Monition is granted for them.*
5. *How put in Execution, if the said Party is present; and faileth to prove that he hath appealed.*
6. *The Manner of making manifest and apparent the Thing adjudged, when the Sentence is demanded to Execution: And how the Party (adjudged to pay the Matter contained in the Sentence) must be proceeded against, if he refuseth.*

1. **R**ES *Judicata*, or the Thing adjudged, is said to be that which is determined by the Sentence; the Sentence adjudgeth, and puts an End to the Matter, but the *Res Judicata*, or the Thing adjudged, is the Effect of it, and possesseth that Determination; for a Sentence may be appealed from, and retains its Name so long as the Time is in being which is allowed for Appeals; but that Time being elapsed, it receives the Name of *Res Judicata*, or a Matter fully adjudged, and cannot be appealed from. Now the Sentence may have its Effects upon the Thing adjudged many ways; as, 1. If it be not appealed from it, within a lawful Time. 2. If the Appeal be not brought into Court. 3. If it be

not † prosecuted; therefore the Sentence is then said to pass, † *Plura de his videas apud manual. Jur. de verb. fig. a Sebast. Almer.*
 or have its Effects upon the Thing adjudged, when the Time of Provocation or Appealing from it is elapsed, so that the Right of the Sentence cannot be any more controverted.

Verbum sententia Sect. 3. Wesemb. parat. ff. de re judicat. n. 3. Modestinus ff. l. 1. de re jud. Christoph. Brecht. in proc. judic. c. 14. in prax. etiam quæ sit, elegantur traditur a Myns. Inst. excep. Sect. de re jud. Item si. n. 1.

2. The Time which the Law limits for putting this Sentence in Execution, is at this Day Fifteen Days from the Time of pronouncing the same; tho' formerly Four Months were allowed: By the Law of the Twelve Tables, Thirty Days was allowed; as Gellius observes in his Twentieth Book, at the First Chapter *.

* *Quando senten. dicatur. transire in rem. Myns. ib. n. 2.*

Wesemb. ubi s. n. 9. Gail. 1. pract. obs. 139. per tot. Myns. obs. Cam. 2. ob. 2, 3, II. etiam. Gail. ibid. ob. 135. n. 10. Cujacius in ff. l. 1. c. 39. leg. 2. & leg. debitoribus. 31. cum ibi not. de re jud.

3. If the Party, who (at the Time of giving Sentence) did pretend and protest to appeal, takes no Care to inhibit the Judge from whom he pretends to appeal within the Time assigned for the Prosecution, and the certifying the Prosecution thereof; or if in case it be not appealed at all judicially, or in Court: If Fifteen Days are elapsed from the Time of pronouncing the Sentence, the Party who obtained the Sentence must go to the Judge who pronounced the same, and must again exhibit before him his Proxy for M. and make his Party for the same, and desire that N. (that the Party against whom the Sentence is given) may be called by a Citation against such a Day, to shew Cause why the Sentence already given against him may not be put in Execution, and the Charges taxed *, which Petition the Judge decrees, appointing the Party (who pretends an Appeal) a Day for his Appearance, according to the distance of his Habitation.

* *Nunquid in tax. expens. debet citari adversarius Lauf. de expens. n. 8. & an sit citand. in executione. ibid. de appel. n. 40, 41.*

4. Upon the Day so appointed † for the said Party's appearance, the Proctor who obtained the Citation must exhibit the same, with a Certificate indorsed upon it; and must accuse the Contumacy of O. who was cited to shew Cause why the Sentence already pronounced against him, † *Quomodo autem facienda sit executio ab Ulpiano pulcherrime ostenditur ff. in lege à Divo.*
15. de re jud. Schurff. concil. 19. cent. 1. Alciat. de senten. exec. Sect. qualiter & quo

may

may not be put in Execution; and why the Charges of Suit, expended on his Part in this Cause, might not be taxed. Wherefore the said Party not appearing, nor alledging any Reason why the said Sentence may not be put in Execution, he must desire that he may be reputed Contumacious, and in Penalty of such his Contempt, that the said Sentence, so already pronounced, may be put in Execution, and the said Charges taxed; then the Judge (the said Party so pretending an Appeal being called three Times, and not appearing) doth pronounce him Contumacious, and, in Penalty of such his Contempt, doth commit the Sentence to Execution; and then the Party obtaining the same, doth give the Judge a Schedule of Charges of the whole Suit, and in Penalty of the aforesaid Party so cited, called and reputed as Contumacious, and not appearing, he must desire the said Charges to be taxed. And then the Judge doth Pronounce and Decree as is requested, and at the Bottom or End of the Schedule given him to Tax, he must write, We Tax N. to pay † such a Sum; and then he must put his Hand to it. Then the Party himself, or his Proctor, must swear to this Taxation, (*viz.*) that they have expended, or are like to expend necessarily, * the Sum taxed; and though it is commonly used, that the Party, who desires this Taxation of Charges, do swear that he hath expended, and is like to expend the same, yet *quere*. Whether the Party ought only to swear as to those Things which are expended, and not those Charges he is likely to expend further in the Matter. Then a Monition is requested to admonish the adverse Party to pay these Charges, and the Thing or principal Lot or Matter adjudged by the Sentence against such a Day, or else that he appear Personally before the Judge upon some Court day, to see himself Excommunicate for his Contempt in not paying the principal Lot or Matter adjudged, and the Charges aforesaid. Which Petition the Judge granteth, appointing a Day for the Payment or Composition of the Matter aforesaid; but observe That this Monition, to pay the principal Lot or Matter adjudged, is to be requested in a Cause of Appeal, when the Judge of that Appeal hath pronounced for his own Jurisdiction, and hath proceeded in the principal Cause; for other

† *An Actor possit petere expensas refici; affirmative respondit, Lanfr. de expen. n. 21. & ibi ab eo tractatur quæ sunt expensæ in quibus victus debet condemnari, n. 18.*

* *In expensar. taxatione tria debent concurrere per ordinem. Lanfr. ubi sup. n. 7. & in n. 18. Sect. attendite etiam quod iudex solum habet taxare expensas factas, non autem faciendas. Alciat. in prax. de expensis. f. 194. Sect. quando & qualiter.*

therways, his Sentence were a Confirmation of the first sentence, and that the Cause is remitted back to the Judge from whom it is appealed; then the said Judge who determined the Appeal, is not Judge as to the principal Lot or Matter sued for, and therefore cannot grant a Monition to pay more than the Charges aforesaid. Likewise observe, That upon some good Motives the Judge may appoint several Days for the Payment, as well of the Thing adjudged, as of the Charges.

5. If the Party against whom the Sentence was pronounced, and who pretends an Appeal, do not appeal at the Time of pronouncing the Sentence aforesaid, but doth appeal in Writing before a Notary and Witnesses out of Court, and being called as aforesaid, (to shew Cause why the Sentence ought not to be put in Execution) doth appear either by his Proctor or Personally; the Party who obtained the Sentence must say, That he doth in the Presence of the said Party, &c. desire that the Sentence already pronounced may be put in Execution, and that the Charges may be taxed. Then the Party appealing, if he intends to prosecute his Appeal, must say, That (under the Protestation of not Consenting, &c. as afterwards in Appeals) he doth exhibit his Proxy for N. and make his Part for the same. And must alledge, That under those previous protestations, the Sentence already pronounced ought not to be put in Execution, in as much as it hath been, and is, on the part of his Client) appealed (in due Time and place) from the said Sentence; and that as yet, the *primum fatale*, doth depend, that is, a Year is not elapsed from the Time of pronouncing the same, or rather from the Time of interposing the Appeal: And then, if the Party who obtained this Sentence doth believe, that the Party appealing did interpose his Appeal in due Time before a Notary and Witnesses, he may desire the Judge to appoint and prefix a Time to prosecute and certify this Appeal: And then that Time or Times so appointed for Prosecution being elapsed, if in the mean time the Judge is not inhibited, the Party who obtained the Sentence may in the Presence of the Proctor who pretends this Appeal) desire that the Sentence may be put in Execution, without any

any other or further Citation or Monition, to that purpose; because the said Proctor pretending an Appeal, hath exhibited his Proxy for his Client since the Sentence was pronounced, and hath alledged an Appeal: Then the Judge ought to commit this Sentence to Execution. But it is here to be noted, that if the Party pretending an Appeal hath so appealed in due Time and Peace, and hath obtained an Inhibition (for he who obtaineth an Inhibition, is said to prosecute the Cause) from the Judge, to whom he appealeth, within the Term appointed for the Persecution of it, though he doth not satisfy the Judge (from whom he appeals) of the Prosecution thereof, neither upon the Day assigned for that purpose, nor upon the Day assigned to certify touching the same, nor before: And though (as above) the Days of Prosecution and Certifying are elapsed; and though the said Judge, from whom it is appealed, do (in the Presence of the Proctor of the Party appealing, who alledgeth no Cause, or in Penalty of the Contempt of the principal Party, who was cited to shew Cause why the said Sentence ought not to be put in Execution) commit this Sentence to Execution; yet notwithstanding this Execution, the Party appealing may prosecute his Appeal, and if it be just, he shall obtain it, notwithstanding that the said Sentence were committed to Execution: Yet the said Proctor (or the Party himself, if the Premises were done in his Presence) ought to dissent from all Things being so done by the Judge, and ought to protest as to the Nullity of them; Mr. *Clarke* says, That this Question (*viz.* Whether or no this committing the Sentence to Execution hinder the Party appealing, though Six and twenty Years are elapsed before he prosecute his Appeal) was very much controverted amongst the Learned Advocates; but it was adjudged for the Party appealing. But if the Proctor, who obtains the Sentence, do believe, that the Proctor against whom it is pronounced hath not appealed within Fifteen Days after the same was so propounded, he may desire the Judge to assign a Time against the next Court-day to prove that it is so appealed; because this Allegation may be proved by the sole Exhibition of the publick Instrument, made upon the Reading of this Appeal before a Notary Publick.

And

And if, within the Term so assigned to prove this Appeal, the Party do inform the Judge that it is appealed, the Judge may (at his Request) assign the said Party appealing one or more Terms to prosecute, and certify as above; which if he do not prove, then the Sentence is committed to Execution. But here observe, That sometimes it is appealed by the Proctor in the first Instance in remote Parts, or else it happens that sometimes the Notary Publick, in whose Presence it was appealed, doth dwell far off; therefore in these Cases, a competent Term is to be given to the Party appealing, to prove that it was appealed in a due Time and Place: For the Proctors in the second Instance of Appeal have not always these Appeals in readiness, but they remain in the Custody of the Proctors of the first Instance, or rather in the Custody of the Notaries, before whom the Appeal was read and interposed.

6. Now if in a Cause of Legacy, I have proved that such Legacy is due *in Specie*, (*viz.*) such Household Goods, Golden Vessels, Golden Chain, or the like, were left me, and the Executor hath withheld the same; and that I have obtained Sentence against the said Executor, to compel him to pay the same, or the true Value thereof, but have not proved what the Value of such Legacy was. Or if, in a Cause of Tithes, I have proved that there were such Tithes due to me, but have made Default in proving the Value of them. Likewise in Causes where I sue for Procurations or Yearly Pensions, if I have proved that they were due to me, but have omitted to prove their Value, Sentence is to be pronounced on my Behalf, that the Premises are due, and are withheld, and the Defendant is to be condemned in them, and in Charges. And the Plaintiff (in every the foresaid Case, before he request the Sentence to be put in Execution, as to the principal Lot or Thing adjudged) ought to call the Defendant, to see the Matters adjudged in the Sentence made manifest and apparent; and also he must desire that Witnesses may be produced thereupon, and may be Sworn and Examined as to the Value of the Things adjudged. And if the Plaintiff prove the Clearness of the said Matters, or that they are apparent what Things he claimeth by that Sentence, then in the Presence of the Defendant

defendant or his Proctor, he must desire that the Sentence may be put in Execution, and the Defendant is to be compelled to pay the Value of the Thing or Matter adjudged by the aforesaid Sentence, as in other ordinary Causes; but if the Premises (as to the aforesaid making apparent the Things adjudged) were done in Penalty of the Contempt of the Defendant, then before any Execution be of the said Sentence, as to the Clearness of the Matter, the Defendant ought again (at least it is most safe) to be cited to shew Cause why the Sentence already pronounced, as to the apparent Value of the Things adjudged, ought not to be put in Execution, and the said Party admonished to pay the Sum or Value thus made apparent. The Reason of this is, because the Defendant may appeal from this Liquidation or Manner of making the Matter adjudged apparent, if the Judge exceed due Measure or Moderation. And observe, That in that Case of making the Matter adjudged apparent, if the Defendant do appear, he may except against the Witnesses produced to prove the same, and may use any Defence which he might of right have used, if the said Liquidation or Proof of the Value had been made before the Cause was concluded. But this Limitation is yet further to be made herein, that if the Plaintiff has already alledged the Value of the Premises in his Libel, and hath produced Witnesses thereupon, and got their Depositions published; then this Publication doth so prohibit and obstruct the said Party, that he cannot produce new Witnesses upon this Matter or Value. To conclude, If the Party, against whom the Sentence is given, doth not pay the Thing adjudged, (if it be in his Custody) and according to the Tenor of the Monition to that Effect abovementioned, then the said Party is to be excommunicate, signified and imprisoned, as above in the Second Part of this Book, touching Excommunications. Thus we have gone through the whole Proceedings in Plenary Causes, from the first Foundation to the Exit or final Determination and Authority the Ecclesiastical Courts can pretend to have in the same.

THE
PRACTICE
OF THE
Ecclesiastical Courts.

THE FOURTH PART.

the whole Order and Manner of Proceeding in
Summary Causes, from the first Instituting, until
the Determination thereof.

CHAP. I.

SECT. I.

1. *What this Proceeding is, and when said to be such.*
2. *The Order of obtaining, executing, certifying and bringing in Citations in these Causes.*

IN the beginning of the Second Part of this Book, as
also in the First Part, you heard that there were Two
Ways of Proceeding in Causes in these Courts, the one
Plenary, the other Summary; according to which
of Proceedings, the Causes were also divided into
M Plenary

† *Gail. pract. ob. lib. 1. O. 7. n. 5. Myns. Inst. de success. sublat. in text. erant, n. 4. Lan. c. quoniam, n. 12. & in c. sepe per totum c. Alciat. prax. de Summaria cognitione, Sect. qualiter fiat, fol. 37. Bartol. in extravagan. ad reprimend. verb. summarie, & verb. de plano.*

Plenary and Summary, the former of which has been even now spoke of, and fully defined. Now this Summary Proceeding is said to be that in which no Reason of Order is kept, but rather all Order is deserted, the Truth of the Fact being only inspected: † Or it is proceeded *de plano, sine strepitu, & figura judicii*; to wit, according to the Form of the Letters. And this Summary Proceeding is divided into *Extraordinarium, Momentaneum, Summatissimum*. What these are, and what Privileges this Summary Proceeding acquires to it self, the aforesaid Authors have declared, especially *Lanfranc* and *Alciatus*, who are very copious herein in the Places afore-quoted.

2. It is needless to repeat again the Order of obtaining, executing, certifying, and bringing Citations into Court, seeing that is already done in the Second Part of this Book, and seeing the same Order, as to that, is alike observed in all Causes.

S E C T. 2.

The Manner of giving in the Libel in this Proceeding; getting the Personal Answer; producing, swearing, examining and publishing the Witnesses.

1. How the Libel is offered and admitted in this Proceeding, and how dissented from by the adverse Party.
2. How the Personal Answer, and the Witnesses, are requested and taken, &c. and published; and how Exceptions also may then be given as before.
3. The Manner of getting the first Assignment to bear Sentence in these Causes.

THE Plaintiff (that is, his Proctor) must give in the Libel, and desire that it may be proceeded Summarily, & *de plano*; which Petition the Judge decrees. The Defendant replies, That he dissents from the Premises and

and this Dissenting is sufficient in these Causes, without contesting Suit, † and denying the Libel, &c. as in the Plenary † *Lanf. ubi sctas* Causes. Then the Plaintiff desires, that the said Libel may *pra c. saepe,* be repeated in full force of the Positions and Articles; which *n. 32.* the Judge may so repeat, with a *Salvo Jure impertinentium, & non admittendorum.* Then the Plaintiff desires, that the Proctor of the Defendant may answer to the said Libel; who answers no other ways, than that he doth not believe the Positions to be true.

2. Then a Citation is requested for the principal Party to appear before either the Judge or Commissioners, and the said Citation is to be brought into Court, the Answer to be taken, and all Things to be done, like as is shewn in the Fourth Chapter of the foregoing Part. The Witnesses are also to be cited, produced, sworn, examined, published and excepted against, in all Things, if Occasion be, as is at large specified in the Chapter foregoing.

3. Now the Proofs being published, the Proctor of the Plaintiff, or he who hopes for Victory in the Cause, desires the Judge to assign a Time to hear Sentence, if the Matters propounded, or to be propounded, obstruct not. And this is called, the First Assignment to hear Sentence, and enjoys the like Privileges in these Causes, as the Term assigned to propound all Acts in Plenary Causes.

CHAP. II.

OF SENTENCE in these Summary Causes,
and the Matters preparatory thereto.

SECT. I.

1. *Witnesses may be produced on the Day which was assigned for Sentence, as above.*
2. *How and when it is said to be concluded in these Causes.*
3. *Informations and Sentence must be given, as in the Plenary Causes.*
4. *How the Sentence must be drawn and pronounced in Plenary Causes, as well as in these Summary Causes, if the Defendant is dead after the Suit is contested.*
5. *The Sentence so requested, and put in Execution, in like manner as before.*
6. *The Proctor's Petition against the Executor or Administrators of the Deceased, in order to call them to shew Cause why the Sentence pronounced in these Causes may not be put in execution.*

1. **U**Pon this First Assignment to hear Sentence (if the Things propounded obstruct not) in these Summary Causes, the Plaintiff or the Defendant, if they have any necessary Witnesses present in Court, and do swear that they are necessary on their Behalfe, the Judge may admit, swear, and examine them, and they may be objected against, or rejected, in the very same manner as when the Witnesses are produced on the Day assigned to propound all Acts, &c. in Plenary Causes, to which we refer you, having spoken before.

2. On this Day thus assigned for Sentence, he, at whose Petition it was so assigned, must desire again that it may be assigned *ad audiendum Sententiam simpliciter*, or that the

next

next Court-day may be again assigned to hear Sentence absolutely. And the adverse Party may either dissent or keep silent at the Premises. And if neither Party (before this second Assignment to hear Sentence is made) do give in any Matter, Allegation or Exceptions against the Witnesses ; then this Second Assignment induceth a Conclusion in the Cause. And note as above, That if on the said Day, so assigned to hear Sentence, nothing is done, then it is said to be concluded in the Cause, *ipso facto*.

3. This being done, Informations are to be had and made in the Cause, like as is spoke in the Proceedings in Plenary Causes, and Sentence is to be given in the same manner, as was there directed.

4. There is this one Thing very material to be considered, which is common to all Causes, both Plenary and Summary, (and which I omitted in the foregoing Part) *Scil.* If the adverse Party, against whom Sentence is to be pronounced, be dead after the Suit is contested, and before the Sentence is so pronounced, you ought to take Care how you condemn the Person deceased (though perhaps the Sentence is made in presence of his Proctor) in any Thing, because in that Case the Sentence would be null and void; but let the Sentence be drawn after this manner, We decree the Party of the said N. to be condemned in such a Legacy, or in Charges, and to be admonished to pay, &c. and in this Case, after the Term which is allowed by the Law for an Appeal is elapsed, (which by the Law is to be done within Ten † Days, but within Fifteen Days by the Statute, from the Time of pronouncing the Sentence) the Executors or Administrators of the Deceased are to be called to see the Sentence put in execution.

5. Now the Sentence is to be requested to Execution in like manner as in Plenary Causes, a Citation being had against the Party, against whom Sentence was laid, to shew Cause why it may not be put in Execution ; upon the return whereof, it may be put in Execution as before.

† *Myns. Inst.*
de excep. Sect.
Item si, n. 2.
Gail. pract. ob.
serv. l. 1. O.
139. per tot.
Myns. obs. Cam.
lib. 2. obs. 2. G.
lib. 3. obs. 11.
Wesemb. de ap-
pel. & rela. n. 9.
parat. ff. Lit. E.

* *Philippus De-*
sius in T. ff. de
Reg. Jur. Sect.
in hæredes, si
lis cum defun-
cto sit contesta-
ta, transit pro-
cessus, ad hæred.

† *Alciat. præ-*
de remission. &
relation. T. de
Senten. Petiti-
on. Wesemb. ff.
de appellation.
& relation. n.
22 Jacob.
Blum. Proc.
Cameral. t. 59.
n. 15. 14. & t.
25. n. 43. &
sq. Gail. 1. ob.
11. n. ult. obs.
121. in fin. &
obs. 42. n. 6.
Gynn. voc. Re-
missoriales.
Sect. penult. &
ult.

6. But if in case the Party is dead, as was even now said, then the Proctor who obtained the Sentence must alledge, That after the Suit was contested, * or perchance whilst the Cause of Appeal was depending, N. (that is, the Party against whom the Sentence was given) died, having made his Will, and appointed such and such Executors, who have proved the said Will legally; or that the said Deceased died Intestate, and that Letters of Administration of his Goods are committed to, and taken by M. Wherefore he must request, that the said M. may be called against such a Day, to shew Cause why Sentence, already read and pronounced in such a Cause betwixt such and such Persons, may not be put in Execution, and the Charges taxed Upon the return of which Citation, the Sentence is to be put in Execution, and all Things are to be acted and done, in and about the same, (like as was shewn in the foregoing Part, in the last Paragraph) as though the Party had not been dead. We might here proceed to shew the Order and Manner of Relations, Consultations, and Remissions, what they are, and when and how done; but I must acknowledge this to be *negotium nimis arduum*, and must therefore refer you to my Authors, † and submit the Matter to the Learned to receive its Illustration, except where Mr. Clarke maketh mention of either of these in this his Practise. I shall adventure to make the Matter so intelligible, as that the meanest Capacity may in some measure apprehend them. Thus having shewn the whole Proceedings, which are common to all Causes, both Summary and Plenary, in general, I now intend to proceed in my proposed Method, and shew how some Causes require and enjoy some Privileges in the Proceedings, which are only proper to themselves, and not to others. Such as are Appeals, Matrimonial Causes, Defamations, and Tithes, &c. and this with as much Method as is possible, or can well be imagined, having such a Labyrinth to wander in, and such a Chaos to model, as all People will (I hope) own Mr. Clarke's Practise to be.

And here also I might have observed, (before we enter upon the Treatise of Appeals) that there are some Sentences

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tences which are void *ipso jure*, and therefore not to be appealed from: But this being a Matter so profound, and of too great a Depth for my Capacity and Experience, I shall therefore refer you to my Authors, † and to the Learned Civilians, whose Reading and Experience can better inform them in this Point: To whom (like as in this, so in all else) do I submit.

† *Wesemb. paratit. ff. l. 49. t. qua Sententia sine appellatione rescindantur.*

M 4

T H E

THE
PRACTICE
OF THE
Ecclesiastical Courts.

THE FIFTH PART.

OF APPEALS.

CHAP. I.

The Manner of Proceeding in these Causes in general.

SECT. I.

1. *What an Appeal is, and what are its Formalities,*
2. *How many Sorts of Appeals there are.*
3. *In what Case it is permitted to appeal from and to one and the same Judge.*
4. *It is lawful to appeal from the Dean of Shorham (and other Deans, and particular Commissaries, which belong to the Archbishop of Canterbury) to the Official of the Archdeacon, or to the Auditor of the Court of Audience.*

5. *The*

5. *The Manner and Order of receiving and proceeding in Causes of Appeal, made to the Courts of the Lord Arch-bishop of Canterbury, and their granting Inhibitions thereupon. Also what these Inhibitions ought to contain, and how certified and proceeded upon.*
6. *The Manner and Order of receiving and prosecuting Appeals made to the King's Majesty, which are tried and determined by Delegates, and their granting Letters of Inhibition, &c. thereupon.*

I Have great need to crave the Reader's Pardon for this Undertaking, knowing that, in this Treatise of Appeals especially, I shall become liable to Blame for not reducing all Mr. Clarke's Titles into their proper Order and Classes, as Mr. Clarke intended them. But I beseech you, good Reader, whoever you are, do me but this Right, as compare his Chaos with this, and then tell me how little Reason you have for a Querele; nay, I hope you will rather excuse what is amiss, or at least regulate it: Either of which I shall own as a Kindness. The Method I have proposed in this Treatise of Appeals, is to speak, First, Of the Order of Proceedings, and the Practise which is common to all Appeals in general; and next, That Order and Practise which is common to those Appeals which are made from Sentences and Grievances, severally and respectfully.

1. Now an Appeal † is no more in Law, than the asking or requesting Help and Assistance from a Superior, against the Injury done by an Inferior Magistrate: Or an Appeal is a certain Provocation, gradually made, from an Inferior Judge to a Superior, that he may, *de novo*, take Cognizance of the Cause already tried, and (as the Appellant intimates) unjuſtly determined, and that he may reduce the Sentence, already pronounced, into a more equitable State: Now these Appeals have certain Formalities and Solemnities to be observed; the Observation of which, is the chief Cause of the Appeals subsisting in their proper

† *Wesemb. ff. T. de appel. & res. la. n. 2, 3.*

† Gail. lib. 1.
obs. 119. n. 2.

per Form. To the formal Part of an Appeal, is requested, First, That it be done *gradatim*, or gradually; that is, to the next and immediate-† superior Judge, no mediate or other Judge being betwixt the Judge from whom and to whom it is appealed. Secondly, That there be a solemn manner of Appealing, which is Twofold; the One, which is made *viva Voce*, with the living Voice; the Other, which is made in Writing. Thirdly, That there be those Things which are more commonly called Solemnities: And those are, the Oath, that it is not frivolously appealed; and also, that (according to the Customs, Statutes, or Privileges of some Places) a Bond or Caution be given, to prosecute the Appeal, and to pay the Thing adjudged, &c. Fourthly, To this Form of Appeal, doth also belong the *Fatale Appellatio*, which is a certain space of Time appointed for the Appeal, so called *a fato*, that is, Death; for during that Time so appointed, the Appeal is said to live; which being expired, it is supposed as dead; by reason of which Death or Expiration, the Appeal is extinguished, like as the natural Life is extinguished by the natural Death. And this *Fatale* is either such as is appointed for interposing the Appeal (which is Ten Days by the Law, within which Time the Appellant ought to appeal, either before the Judge by whom he is grieved, or before a Notary) or such as is appointed for the Prosecuting * of the Appeal; in which Time the Appeal so interposed ought to be prosecuted to the End.

* Myns. cent. 1.
obs. 31 cent. 3.
obs. 54. Gail 1.
ob. 141. Rubric.
Gail lib. 2. n. 1.6.
cum seq.

† Wes. parat. ff.
de appel. n. 5.
Pleniùs vero
videas de his
app. de verb.
sign. à Sebast.
Almers. verb.
appellatio. Sect.
15. per tot.

2. Now Appeals are of Two Sorts, (*Scil.*) either Judicial, or Extrajudicial†: The First, from the Sentence; the Last, from the Acts, and the Extrajudicial Decrees.

The Judicial Appeal is made, either from the Definitive or Interlocutory Sentence.

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Deferring to pronounce Sentence.

Rejecting some concluding Matter, such as are caused when the Sentence is pronounced.

The *Extrajudicial Appeal* may be interposed upon such Grievances as any one may suffer, by

An unjust Excommunication upon a false Certificate of the Citation.

Immoderate Taxing of Charges.

Too short a Delay, or Time *, wherein to do any Act, &c.

Denying Audience to any † one.

* *Lanf. de interloc. & Apo.*

n. 65.

† *Lanf. ibid. n. 66.*

Many other Grievances may be inflicted, according to the Circumstance of the Matters or Things in Contest, and thence may arise Causes of Appeal: To enumerate all which Grievances, is not within the Bounds of any Man's Knowledge or Foresight to particularize.

3. If a Judge do constitute or substitute some one to proceed upon all Causes in his absence; or another to proceed in some particular Cause, or in some certain particular Causes: Or if a Judge doth grant his Authority to certain Clergymen to examine Witnesses in remote Parts, as in the Fourth Chapter of the Third Part, &c. If any Grievance is inflicted or offered by this Substitute, particular Commissary or Commissaries, so appointed as aforesaid, the Party grieved thereby may appeal from the said Substitute or Commissary, &c. to the same Judge who appointed that Substitute, or gave that Authority: And thence comes this general Conclusion, That it is lawful to appeal from one who is delegated, to one who delegates.

4. At the beginning of this Book, where we spoke of the modern Judges, there are express'd the Reasons why the *Official of the Arches* was anciently called the *Dean of the Arches*, though in very deed he be no *Dean*, but an *Officer*. Seeing therefore, not only the *Dean of the Arches*, but also the *Dean of Shorham and Croydon*, (though scituate within the Diocese of London) and *Nynbury*, are immediately subject to the Archbishop of Canterbury,

bury, and are almost exempt from the Jurisdiction of the Diocesan Bishop, and may appeal from them (as from particular Judges, having Jurisdictions limited and restrained) to the Courts of Arches, or Audience. For the Statute, which is set forth touching the Form of interposing Appeals, makes no Mention of these Appeals, therefore they are left to the Disposition of the Common Law; likewise, for the above-said Reason, it is lawful to appeal from the Commissaries of the Archbishop of *Canterbury*, within the Dioceses of *Canterbury*, unto the said Courts of the Arches and Audience.

5. Now if an Appeal be interposed, from Grievance or a Definitive Sentence pronounced or inflicted by an inferior Judge in remote Parts, an Inhibition is first to be requested from the Judge to whom it is appealed, (*viz.*) from the Court of Arches, or Audience; (in which Inhibition is usually writ, or inserted, a Citation for the Party who obtaineth the Sentence) † or at whose Petition the Grievance was imposed, (which Party is called the Party Appellate) to answer in a Cause of Appeal; and by vertue of this Inhibition, the Judge from whom it is Appealed, his Register, and the Party Appellate, are to be inhibited, that they proceed not farther to the Execution of the Sentence, pronounced against the Appellant, whilst this Appeal depends, nor do any Thing to his Prejudice: And this Inhibition is to be certified to the Judge to whom it is appealed, with a Certificate thereupon making mention what Day the Judge and Party were inhibited, and on what Day the Party Appellate was cited to answer in this Cause of Appeal. And if the said Party Appellate do not appear, he is to be proceeded against, and Excommunicate in Manner and Form, as was spoke in the Second Part of this Book, where it is treated of the original Process, or Citations.

6. All Appeals from the Most Reverend the Archbishop of *Canterbury*, or from his Courts and Judges, (*viz.*) from his Courts of the Arches, Audience, and Prerogative, are to be interposed to the King's Majesty, and his Court of Chancery; and the Proctor of the Party appealing went to draw the Form of a Commission, which he ought

† *Quæ sit Inhibitio & quæ debet continere.*

Reading. pand.

Cam. l. 3. tit.

11. Gylm. voc.

Inhibitio, Sect.

Differentia.

Wesemb. para.

ff. lib. 49. t. 7.

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That this is the order and manner of receiving Appeals, and granting Inhibitions, as Mr. Clark says. I could produce several Precedents in the Courts of the Lord Archbishop of *York*.

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intimate to some Master in Chancery, (particularly designed for this Purpose) together with the Instrument of Appeal, if it be appealed Extrajudicially before a Notary-Publick; or otherways, with a true Copy of the Act made before the Judge, (from whom it is appealed) subscribed with the proper Hand-Writing of the Writer of the Acts of the said Judge, if it be appealed at the Acts of Court at the Time of pronouncing the said Sentence : And then this Master doth testify, by a Subscription under his Hand, on what Day this Commission was exhibited before him ; and afterward the Proctor obtains the same under the great Seal of *England*, which he must present to the Judges, who are delegated by that Commission, under this Form : I N. on the behalf of our Sovereign Lord the King, do present to your Authority, these Letters Commissionall; and do desire, that ye will vouchsafe to take upon you the Execution of them, and Decree, That the Judge from whom it is appealed, and the Party Appellate, may be inhibited, and that the said Party Appellate may be cited to appear upon such a Day, to answer in such a Cause of Appeal. Then the said Judges make answer thus : For the Honour we bear our Sovereign Lord the King, we take upon us the Execution of these Letters Commissionall, and do Decree, That it shall be proceeded upon according to the Tenor of the same, and that the Judge from whom it is appealed, the adverse Party, and all others, be inhibited ; and we Decree the said adverse Party to be cited to answer in a Cause of Appeal : And in these Appeals to the King's Majesty, it is to be proceeded in all Things, like as in other Causes of Appeal, to the Courts of the Archbishop of *Canterbury* And note, That it is very necessary, that in every Commission of Appeal, (and specially those which are exhibited before the Lord Chancellor) the † Date or Day of the first Exhibition or Presentation of this Commission be writ down, that so it may appear to the Party Appellate, whether or no the Party appealing do duly prosecute this his Appeal within the Time assigned him (by the Judge from whom he appealeth) for that purpose : Which if he do not, then the Appeal may be deserted ; and this Desertion

† *Attendite quod ubi literæ delegationis sunt presentatæ sufficit Notario scribere talis Exhibuit tales literas, &c. quæ incipiunt sic & finiuntur sic, nec est necesse inferri totus tenor litterarum. Lanfr. in c. quoniam. de prob. n. 9.*

will appear, by inspecting the King's Commission; in the Proof whereof, the Party Appellate will be very much relieved, seeing such Desertion may appear so easily; but for the better understanding this Cause of Desertion, observe what is said afterward.

S E C T. 2.

1. *What are those Four Times which are to be considered in Appeals, and how Appeals are interposed, and when.*
2. *Why there is a Necessity for the Proctor to appeal, though his Office is expired or determined.*
3. *The Manner and Order of asking and requesting Apostles or Dismissions; and within what Time they ought so to be asked and requested: Also what these Apostles are.*
4. *What Remedy, if the Apostles are refused; and why you must necessarily appeal from such Refusal.*
5. *The Manner of assigning the Apostles; and appointing the Appellant to prosecute and certifie, &c.*
6. *The Manner of the Proctor of the Party Appellate's appearing before the Judge to whom it is appealed, to get his Decree for the Party appealing to prosecute.*
7. *When and in what Cases the Party appealing (if he cannot get his Appeal determined in the first Year) ought to have a Part of the second Year allowed for that Purpose; and how the Appellant ought to make a Protestation, what Impediments hindered his getting the Appeal determined, &c.*
8. *Also what these Impediments are, which may be alledged to get the Fatale Legis, and the Fatale Hominis prorogued.*
9. *In what Part of the Proceedings the aforesaid Impediments ought to be alledged by the Appellant, in order to get longer Time for this his Appeal.*
10. *In what Case a second Year ought to be allowed the said Party appealing, in which to get his Appeal determined.*
11. *In what Case the Proctor appealing may be compelled to prosecute the Appeal, and give a Libel, without any Decree for the principal Party himself to prosecute.*

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12. *When, and in what Cases, it ought to be decreed for the Party appealing to shew Cause why his Appeal may not be declared as deserted.*
13. *The Manner of Proceeding, when the Party appealing is called so to shew Cause why his Appeal may not be declared for deserted.*
14. *The Manner of Proving, that the Appeal is deserted in this Case.*

IN these Matters of Appeal, there are Four Times to be considered †; the First is, the Time of interposing the Appeal, and that is Ten Days; Secondly, the Time of desiring the Apostles, that is Thirty Days, which take Place immediately from the Sentence; Thirdly, the Time of presenting himself before the Judge (to whom it is appealed) with this Appeal; Fourthly, the Time of prosecuting this Appeal to interposed; and that Time is a Year, sometimes Two Years, which occurs from the Time of the Appeal interposed; within which Time, unless the Appeal be prosecuted, it is pronounced as deserted, and the Cause is to be remitted back to the Judge, from whom it was Appealed*; amongst the Saxons, (saith † *Wesembecy*) in some Cases, they interpose the Appeal immediately at the Act of Court upon the pronouncing the Sentence, or the inflicting the Grievance; which Practice is rarely observed, for we rather respect the Time limited by the Law for that purpose: Therefore whether it be appealed immediately at the Act of Court or not, it is necessary that afterwards (in the due Time appointed by the Law) an Appeal to be interposed in Writing.

2. Now though the Proctor's Office is determined and extinct so soon as the Definitive Sentence is pronounced (unless the Proxy be exhibited *de novo*), yet this Proctor ought to appeal from the Sentence in due Time and Place, unless his Client do give him some contrary Order: For otherwise the Client hath an Action against his Proctor (so neglecting to Appeal) for such Damage as he may suffer by such Neglect of his Proctor.

3. If any appeal from a Definitive Sentence at the Acts of Court, and doth desire Apostles to be given, and assign-

† *Wesemb. par. ff. de Appel. 1. quando Appel. 4. n. 1, 2, 3, &c. Lanf. de int. & Appel. n. 51. et tiam notat. in margine. n. 1. Sect. preceden.*

* *Mynf. obs. Cameral. cent. 1. obs. 8. † Wesemb. ubi supra, n. 3. Chilianus in pract. cap. 124, 125. Saxon. lib. 2. art. 6. Mynf. ubi supra, cent. 1. obs. 7. Lanfr. ubi sup. n. 49.*

† *Wesemb. ubi supra, lib. 49. T. de Libellis. dimissoriis. n. 3. 4. Chilianus in pract. c. 130.*

* *Wesemb. ubi supra. de app. ff. n. 9. de quo utile est protestari, non tamen necessarium lit. c. Lanfranc. ubi supra de Appel. n. 83. vers. Secundo requiritur quod proponatur protestatio, non est necesse amplius Appellare, tutius tamen, &c. ad finem. nota bene, & n. 84.*

† *Wesemb. parat. ff. l. 49. T. de Libel. dimiss. n. 2. Rosbach. proc. tit. 74. n. 2. Alciac. de Apost. per.*

ed, and the Judge assigneth a Term, or a Time allowed in the Law, on which to receive Apostles; the Party appealing ought, within Thirty Days, † (to be accounted from the Time of pronouncing the Sentence) to go (from one Time to another, and from that Hour of the Day in which the Sentence was pronounced, even until the last Hour of the Day in which the Apostles ought to be requested) to the Court of Judicature, and if he can have the Presence of the Judge in Court, he must desire and request that he will grant Apostles, *Instante, Instantius, & Instantissime*, that is, with all possible speed. And if the Judge, who is thus earnestly solicited and called upon, do refuse to give or assign Apostles, then is there just Cause of Appeal upon such Refusal. But if in that Day or Time, and Place aforesaid, (in which the Party appealing as above was present, and ready to ask his Apostles) the Judge were not present also, then a Protestation * is to be made by the said Party appealing before a Notary Publick, and Witnesses, That he is ready and prepared to ask Apostles, if in case he could have the Presence of the Judge; and for a further Cautel, let him desire Apostles before the said Notary Publick, and Witnesses, and also request the Notary Publick, then present, to draw up a publick Instrument upon this his Protestation and Requisition, and also the Witnesses then present, to give their Testimony thereupon. And like as the Party appealing, (in order to found the Jurisdiction of the Judge to whom he appeals) ought to exhibit the Instrument of Appeal, before it is concluded in the Cause: Even so, in the aforesaid Case, he ought to exhibit the said Instrument made upon the Petition of the Apostles, and the Protestation so made before the Notary and the Witnesses, or otherwise he ought to suffer and lose his Cause. And here observe, That if the Party appealing do not desire and ask Apostles in Manner and Form as aforesaid, he ought to lose his Cause of Appeal, though he might probably have a just Cause of Appeal as to the principal Business. Now these are called † Dimissory Libels, because by them the Cause is dismissed to him to whom it is appealed. They receive

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the Name of Apostles, from the Greek ἀπό τῶ ἀποστόλων, which signifies to send † away.

4. And if the Judge, either at the Time of pronouncing the Sentence, (when it is appealed at the Acts of Court) or in the aforesaid Case, on the Thirtieth Day after the Sentence is propounded doth assign Refutatory Libels, (that is, those whereby * he shews Reasons wherefore he thinks not fit to grant these Apostles or Dimissory Libels) or doth order and decree nothing upon your Petition touching these Apostles; though you have appealed from the Definitive Sentence, yet if you do not also appeal from the Denial of these Dimissory Libels, or from the aforesaid Assignment of the Refutatory Libels, you will be in Danger of losing your Cause. But Mr. Clarke bids you enquire as to this Point of Practice, though he says he has seen it thus adjudged. And these Appeals you may prosecute both together, or successively one after another, (if you have appealed from them both) like as in other Causes of Appeal from the Definitive Sentence, and from Grievances, as the Taxation of Charges, &c. and if you do not obtain both your Appeals, yet you may obtain one of them, (viz.) in your Appeal from the denying of Apostles: For you shall not obtain your Appeal from the Definitive Sentence, if you do not likewise appeal from the denying of Apostles.

† Wesemb. parat. ff. l. 49.
T. de Libel dimiss. n. 2. Rosbach. proc. tit. 74. n. 2. Alciat. de Apost. pet.

* Wesemb. ibidem, n. 4. versus finem, Chilian. in pract. c. 130. Roding. Pand. Camer. tit. 23. l. 1.

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tur in Curiis
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secuta.

5. At such time (as was now said) as it is appealed before the Judge, *à quo*, or from whom, and that the Apostles are asked; the said Judge (moving his Hat from his Head) must say, For the Honour and Reverence we bear to our Sovereign Lord the King, we grant this Appeal, and instead of Apostles, we assign to the Party appealing the whole, and all the Proceedings: Then the Party who obtained the Sentence must desire the Judge, that he will please to assign the Party (who pretends this Appeal) a competent Time or Times, as well to prosecute this Appeal, as to certify the Prosecution of it: Whereupon the Judge assigns three Weeks Time, perhaps, † for the Prosecution of this Appeal, and a Month's Time for the certifying; during which Times, nothing is to be attempted or innovated by the Party (on whose Account the Sentence was

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pronounced, or the Grievances imposed) to the Prejudice of the Party appealing.

6. Seeing it often falls out, that the Party appealing doth inhibit the Judge (from whom he appeals), by Vertue of an Inhibition obtained from the Judge to whom he appeals, and doth so restrain his Power that he cannot proceed any further to the Execution of his Sentence, and takes no Care to cite the Party Appellate; or, perhaps, if he hath cited him, takes no Care to certify his Inhibition: In this Case the Proctor of the Party Appellate may appear before the Judge, (to whom it so pretended to appeal) under a Protestation of not consenting to the said Judge, nor any way proroguing his Jurisdiction further than by Law he is bound, which Protestation being alway safe, &c. he must exhibit his Proxy in Writing for N. that is, the Party Appellate, and make his Part for the same, (and under his Protestations aforesaid) he must alledge to the said Judge, That M. the Party appealing hath obtained from his Court certain Letters Inhibitory and Citatory, to inhibit the Judge from whom it is appealed and his Client (that is, the Party Appellate); by Vertue of which Letters he hath taken Care to cite the Party Appellate, or perhaps hath cited him, but takes no Care to certify this his Citation, nor to prosecute this his Cause of Appeal: Therefore he must desire the said Judge (to whom it is thus pretended to be appealed) to decree, that the Party appealing may be cited against some convenient Day to prosecute this his Appeal, under Penalty of having the Cause remitted back to the Judge from whom it is appealed, and the Party Appellate to be dismissed with Charges: Which Petition the Judge decreeth, appointing a Day for the Appearance of the said Party appealing. And observe, That the aforesaid Protestation is also very necessary to be made on the Day of the Appearance of the Party Appellate; lest, perhaps, he should seem (by appearing simply without the aforesaid Protestation) to consent to the Judge of the Appeal; for if it be not lawfully appealed, the Judge hath no Power to take Cognizance of the said Cause of Appeal, because by this Appeal the Jurisdiction of the Superior Judge is found-

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ed, and the Jurisdiction of the Inferior Judge is suspended ; which though it be so, yet if the Party Appellate do appear before him without the aforesaid Protestations, he seemeth to consent to him as a competent Judge on his behalf. But this is to be understood as to the ordinary Judge, who is appointed to take Cognizance of all Causes, whether Appeals or others.

7. If the Party appealing is diligent to prosecute his Appeal in the first or second Part of the Year, and then some Impediment doth intervene, which Impediment being removed, there remains only so much Time (and no more) as might serve the Party appealing, if he is diligent to get his Appeal determined in, then in this Case a second Year is not to be given this Party thus appealing; but he is to have so much of the second Year given him, as he was hindered or lost in the first Year: And so a Computation is to be made of one Year out of the Days of the second Year, by allowing so many Days as were really lost, or elapsed, by some Impediment or Hindrance. Mr. Clarke saith, That he hath seen this Allowance made in a Court of Controversy some Years ago; but he saith, That the late Doctors hold the contrary Opinion, (*viz.*) That no Time or Proportion of the second Year ought to be given in lieu of such Impediment, if there remained as much Time (after such Hindrance) of the first Year, as was sufficient for the Determination of this Appeal, if the Appellant had been diligent: Therefore consult the *Juris peritos* in this Cause. But a sufficient Time to prosecute and determine Appeals † is said to be one Month, though some hold, that as much Time may be appointed for this Purpose as the Judge thinks fit in his Judgment to appoint, or is sufficient. Now the Civilians are of Opinion, That although some Impediment was caused by the adverse Party, or the

† *Lanfr. de interloc. & App. n. 53. tempus appellationis finiendæ de jure communi est annus, & ex legi-*

ma causa biennium; sed hoc sat. in Camera non esse observatur de verb. sign. à Sebast. Alm. verbum Appellatio Sect. 12. Gail. 1. Obs. 141. n. 8. Myns. cent. 6. Obs. 2. n. 6. Roding. pand. Cam. lib. 1. tit. 28. Jacob. Blum. proc. Cam. tit. 49. Alciat. de Appellation. Sect. intra quæ tempora in fine. Lind. de sequest. possess. Sect. si tamen verb. prosecuta ad proseguendum non statuitur terminus à jure, sed ad finiendum statuitur annus, & ex causa biennium, & in tit. de appel. §. 2. verb. prosecuta.

Judge from whom it is appealed, so that the Cause cannot be ended in the first Year; or if there were any other lawful Impediment, so as the Party appealing may, or is not bound to proceed in the Cause, yet it is convenient, (at least it is safe) that the Party appealing (in all Acts, in which these Impediments do appear) do take notice to the Judge of such Impediments, and protest concerning them, that they are such, especially if the said Impediment be made by the Judge, or any other Third Person: And this he must do to the following Effect; (*Scil.*) I protest that there hath not, doth not, neither shall stand any Impediment or Cause on my behalf, so as this Cause may not be determined within the Time appointed by the Law, but that it doth stand on the Part of the Judge, or the Party Appellate, or the said Third Person, so as it cannot be determined.

* De hisce pluram videas apud Alciat. de Appell. in exceptionibus ad regulam mentionat. in Sect. Intra que tempora Lanfr. ubi supra, n. 53. vers. Ecce ultima Authentica de appell. col. 8. & extr. de appell. cap. significantibus.

† Lindwood. de sequest. c. frequens verb. prosecuta legitime itaque appellationem prosequi intelligitur qui facit suam diligentiam ut eam possit infra annum terminare & ibi dicitur quod terminus prosecutionis, prorogari possit ex consensu partium.

8. The Causes * which may be alledged to the Purpose aforesaid, or those Impediments here spoke of, may be these: 1. If the Party Appellate being cited to answer the Party appealing in a Cause of Appeal, doth not appear either by his Proctor, nor in Person; and if the Party appealing doth use all Diligence † to get the said Party Excommunicate, &c. this is a just Impediment, at least for such a Time in which the Party Appellate stood Excommunicate. 2. If the Party Appellate doth give in or exhibit any contrary Matter or Exception, which is not to be admitted, or perhaps which may be, and is admitted, and yet doth defer the Suit as to the Proof thereof, but proves nothing, this is a lawful Impediment; because that during that Delay, so given to prove, &c. the Party appealing cannot ask any Thing, in order to bring the Cause to a Conclusion. 3. Also if the Proctor of the Party appealing doth give any conclusive Matter, which ought by Law to be admitted, and yet the Party Appellate doth so oppose the same, that he hinders the Admission of it; if afterward the said Matter is admitted, and is proved, this is an Impediment for such Time as the Admission was hindered, and is to be computed from the Day in which the Matter

was offered. 4. Also if the Party appealing be so Poor that he cannot prosecute and finish his Cause, this his Poverty being proved, he ought to have a second Year allowed him, as is spoke afterward. 5. Likewise if the Party appealing be imprisoned all the first Year, or so long a Time of it, that he hath not Time enough remaining to finish this his Appeal, this is also a just Impediment. 6. Also if the Party appealing is hindred by some Epidemical Distemper, as the Plague, &c. or some other Judgments of God, or the Command or Edict of the Prince, so as he cannot come to prosecute this his Appeal, this is also a just Impediment. 7. Also if the Party appealing doth take Care to get the Judge from whom it is appealed, and his Register, to be admonished to transmit the Proceedings; and on the Day assigned for the Transmission of them, doth accuse the Contumacy of the said Register and Judge, and doth insist to have them decreed Excommunicate, and doth offer a Schedule of Excommunication, which he desires may be read, and that Justice may be done: But the Judge to whom it is thus appealed, careth not to Excommunicate the said Judge (from whom it is so appealed) and his Register, but reserveth the Penalty of their Contempt from one Day to another, so that the Proceedings are not transmitted in due Time; this therefore may be accounted a lawful Impediment, for the Proceedings not being transmitted, the Cause cannot be prosecuted: Therefore let the Proctor appealing take Care, that the several Reservations which are made of their Contempt (for not transmitting the said Proceedings) be mentioned in the Acts, but not that they were made at his Petition. 8. If in the last Part of the Year, (*Scil.*) the last two or three Months at the End of the said Year, the Cause (by the mutual Consent of the Parties) is put to Arbitration, and referred to Arbitrators, and that the Parties are mutually bound, or have promised by Word of Mouth, that, during this Arbitration, the Proceedings shall be stayed, or that they will stand to this Arbitriment; and if this Arbitration is not determined until the End of the first Year, in this Case a second Year ought to be given.

9. If the Premises, or any other lawful Impediments, do happen in the second Year, then the Party appealing ought to desire a Restitution of the third Year; for by Law a third Year ought not to be given; but the said Party appealing shall obtain the Benefit of a third Year by way of Restitution, and the said Party appealing ought to use all possible Diligence in the Prosecution of that Appeal in that third Year. And these Impediments are they which may be urged, as Causes why the *Fatale Juris* (or the Time limited by the Law for the Prosecution of Appeals) may be prorogued. There are yet other Impediments which may be urged as Causes for the proroguing the *Fatale hominis*, † (which is the Time assigned or limited by the Inferior Judge for the Prosecution of the Appeal) and these may also be added to the former, viz. the Tedioufness of the Journey (which the Appellant is to take) from the Place of Judgment, or the Court of the first Judge, to the Place or Consistory of the Judge to whom he intends to appeal, (being perhaps an Hundred Miles distant) in order to obtain an Inhibition within the Time assigned to prosecute and Certify: In this Case the Appeal may be said to be prosecuted, though the Time assigned by the Inferior Judge be elapsed before the Party appealing return from his Journey, &c. Likewise if the said Party appealing from the Courts of the Archbishop, do (within the Time assigned to prosecute) use all Diligence to obtain the King's Commission * upon his Appeal, and the Lord Chancellor is not at leisure to Seal this Commission, yet the Appeal is prosecuted, though the Commission bear Date after the Day given or assigned to prosecute; and in these Cases the Time ought to be prorogued for the Purpose aforesaid. Likewise in those Cases in which it is appealed to the Courts of the Archbishop, if the Impediment happen on the Account of the Judge to whom it is appealed refusing to grant or seal his Inhibition, yet the Appeal is said to be duly prosecuted; so as the same be requestest before the Day assigned to prosecute, or if the Inhibition be offered within the Term, or before it be elapsed. If the Party appealing (before the Day assigned to prosecute his Appeal) doth go to the Judge (from whom it is appealed)

† *Myns. observ. cent. 2. obs. 15. & 22. Gail. 1. obs. 140. n. 4. Ordo. Cam. p. 2. tit. 30. Fatale legis & hominis quid sint vide de verb. sign. à Sebast. Alm. verb. Appellatio.*

* *Et dicitur quis Appellationem prosecui qui literas impetrat. Lind. de Appe. c. freq. verb. prosecuta.*

appealed) or his Register, for a Copy of the Sentence, or Copies of the Acts of Court, (in order to prosecute this Appeal) and these Things are denied him, or at least they so delay to deliver them, that in the mean time this Term assigned to prosecute, &c. is elapsed; this may also be said to be a just Impediment, and may have sufficient Reason for the proroguing the Term to prosecute, &c.

9. But if these Impediments † which hinder the Prosecution of the Appeal within the *Fatale hominis*, or the *Terminum Juris*, do not appear by the Acts of Court of the Judge, (to whom it is appealed) it is the Part of a cautious Proctor to alledge these Impediments before it be concluded in the Cause: For, saith Mr. Clarke, I have known it adjudged, that the Party appealing ought not to be admitted (after the Cause is concluded) to alledge those Impediments (which hinder the Prosecution of the Appeal) not appearing by the Proceedings. Likewise if the Party Appellate do alledge, That the Appeal is deserted; the Judge doth assign two Times or Terms to hear his Pleasure, whether the Appeal be deserted or not, because upon these two Assignations the Matter is said to be concluded as to that Article of Desertion: Therefore it is not permitted to prove the Impediment by Witnesses, after it is so concluded upon the aforesaid Article, though perhaps it be not concluded upon the principal Cause or Appeal. But here it is to be noted, That although it be alledged by the Party Appellate, (that is, the Party against whom the Appeal is instituted) that the Appeal is deserted, (which Allegation is denied by the Party appealing) and that the Judge doth (at the Petition of the said Party Appellate) assign to hear his Sentence, if in Case the Appeal be not deserted, and that not only once, but twice, or oftner; in this Case the Party appealing (notwithstanding such frequent Assignations so to hear Sentence) may alledge, and prove the Causes of Impediment, if they appear not by the Proceedings themselves. The Reason is, because the aforesaid Assignations were not Absolute, but Conditional, (to wit) if in case the Appeal were not deserted: But in these Cases, consult the Learned Advocates: Though I (saith

† *Si Appellans non prosequens Appellationem infra Terminum sibi à jure vel homine praefixum probare velit selegitimè impeditum admittetur ad hoc antequam lis sit contestata. Ita. Lind. de Appel. c. frequens. verb. Prosecuta.*

Mr. Clarke) writ nothing but what I have known, and seen practised.

* De hac materia late tractatur à Lanfr. de p. n. 53. vers. quero ulterius etiam à Lind. de App. l. c. 1. in gloss. super verb. prosecuta & Lanfr. ubi sup. n. 51, 52. bene nota.

10. If the Party appealing were negligent in the first and second Part of the Year, and yet diligent in the third Part thereof, in which did remain so much space of Time, as might serve to get his Appeal determined; unless some Impediment happen, * by which he is impeded, so as he cannot finish his Cause; he ought in this Case to have a second Year allowed him, the Impediment being lawfully proved, so as it do appear by the Acts of Court, that the Party appealing hath used his utmost Endeavours to prosecute and finish his Appeal in the said third Part of the first Year; and that he might probably have so determined it, had not this Impediment happened: Though some are of Opinion, that where such Impediment doth happen in the end of the first Year, all the second Year ought not to be given, but only so much Time of the second Year as the Party appealing was hindred, or lost in the first Year.

11. Now so often as it is appealed from the Sentence of Excommunication inflicted by an Inferior Judge, the Proctor of the Party appealing is wont, and is bound to exhibit his Proxy for the said Party appealing, (in order to obtain the Inhibition and an Absolution) and make his Part for the same; which Thing is not usual in obtaining other ordinary Inhibitions. Therefore, in this Case, the Proctor of the Appellate (seeing the Proctor of the said Party appealing is ready to proceed in Court) may desire a Libel of the said Proctor of the Party appealing, or else his Client to be dismiss'd, without having any Decree against the principal Party to prosecute. And if the said Proctor doth not give in his Libel, then the Party Appellate is to be dismissed, and the Cause is to be remitted back to the Judge from whom it was appealed, in like manner as if the Party himself had been called to prosecute his Appeal.

12. At the sixth Number of this Paragraph was shewn, That if any do inhibit the Judge, and takes no Care to cite the Party Appellate, or perhaps do cite him, but doth not prosecute his Cause, he may be called to prosecute the same under Penalty of a final Remission of the Cause, and

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a Dismissal of the Party, &c. So likewise, if in case of a Desertion, a whole Year be elapsed from the Day on which the Inhibition was served on the Judge, from whom it is appealed, or at least from the Day of pronouncing the Sentence, or imposing the Grievances from whom it is appealed; then it is lawful for the Party Appellate to call the Party appealing (unless his Proctor be present in Court) to appear on such a Day, to shew Cause, if he can, why the pretended Appeal (interposed by him) from the Definitive Sentence, or from certain pretended Grievances, may not be pronounced for Deserted, if there be any Appeal, (because sometimes Inhibitions are obtained when there is no Appeal) and also, why the Party Appellate may not be dismissed, and the Cause remitted back to the Judge, from whom it is thus pretended to be appealed, together with Charges; this Decree is wont and may be asked by the Appellate, and may be granted by the Judge, if the Judge appealing doth not prosecute his Appeal within the *Fatale hominus*, (that is) the Term assigned by the inferior Judge for that Purpose.

13. Now this Decree or Mandate being executed and returned, if the said Party appealing do not appear, or if he doth appear, but alledgeth no Cause why his Appeal may not be pronounced for deserted; nor doth give a Libel, or desire a Term for that purpose: Then the Judge, at the Request of the Party Appellate, may either by his Sentence in Writing, or by the Interlocutory Decree, pronounce the Appeal to be deserted, and remit the Cause back to the Judge from whom it was so appealed, and dismiss the Party Appellate with Charges taxed, or to be taxed. But if the said Party appealing do appear, and give a Libel, or doth desire a Term for that Purpose, and that it may be proceeded in the Cause of Appeal, the Party Appellate may alledge, that the Appeal is deserted; and if he takes upon him to prove this his Allegation, the Proceedings are to be stay'd as to the Cause of Appeal, until this Allegation as to such Desertion be either proved, or not proved. And if it is proved that the Appeal is so deserted, then the appealing Party is to be condemned in Charges, and the Cause is to be pronounced as Deserted, and is to be remitted to the

* *Lind. de se-*
quatr. Sect. si
zamen verb.
Prosecut. vers.
Ul. in gloss.

the Judge * from whom it is appealed. But if, on the contrary, the Party Appellate doth make Default in the Proof of such Desertion, the Party appealing may first obtain a Sentence, or an Interlocutory Decree, that the Appeal is deserted, with a Condemnation in Expences, and then he may give in his Libel, and proceed in the principal Cause: Yet it is but requisite that the Party appealing (in every Act or Thing done at the Time of the said Objection) do protest and aver his Diligence, and that he is then ready and prepared to prosecute this his Appeal, if in case he were not hindered in the Prosecution of it by such Objection made by the adverse Party.

14. In this Case it must be alledged in all Things, and proceeded, like as is spoken afterward in the following Sect. As to the Form of alledging a Desertion, &c. for, as was said before after the Cause is concluded, no Impediments can be alledged to hinder a Desertion of the Appeal, except such as appear by the Acts or Things done; therefore for the Party Appellate, in order to prove that the Appeal is deserted, it is sufficient that he shew the Day on which the Sentence was pronounced, and the Act of Court, (upon the Assignment of a Time to prosecute) from which will appear easily, that the Appeal is deserted, in not being prosecuted within the *Terminum hominis*: As also this Desertion may be proved by the Date of the Inhibition, or by the first Act upon the granting thereof, if it were with an Absolution. But if neither the Inhibition be returned, nor any Act be done touching the granting of the same, then the said Allegation of Desertion is to be proved by exhibiting the Act of the Judge, (from whom it is appealed) upon the pronouncing the Definitive Sentence, subscribed with the proper Hand-writing of the Register of the said Judge. And if this Act be owned and confessed by the Proctor of the Party appealing, (*viz.*) that the said Copy is a true Copy of the Acts of the aforesaid Inferior Judge, or that it is subscribed by the Hand of the Register of the said Judge, and doth agree with the Original, if by inspecting the same it doth appear to the Judge to whom it is appealed, that there is a whole Year elapsed from the Day of pronouncing the said Sentence, or rather from the Time

of interposing this Appeal, if it appears that there is any, then must he Proceed and Decree in all Things, as is mentioned in the Number foregoing. But observe, That although the Party Appellate do call the Party appealing as above, to shew Cause why this Appeal may not be declared for Deserted, or Forsaken; and if he knows for certain that the Appeal is deserted, yet may he omit this Objection, and permit the Party appealing to give in his Libel, and proceed in the Cause until the Proceedings of the Judge from whom it is appealed be transmitted, and then he may alledge the Desertion of the Appeal. And sometimes it is expedient for the Party Appellate to defer his propounding and objecting this Desertion of the Appeal, until the Proceedings are transmitted: For if it is appealed Extrajudicially before a Notary Publick in Writing, so that neither the Appeal, nor the Inhibition of the Judge (seeing it remains in the Custody of the said Party appealing) are in the Register's Custody, it cannot appear whether the Appeal is deserted or not. Therefore when once the Proceedings of the said Judge from whom it is appealed are inspected, it may easily appear. And if in this Case the Party Appellate doth alledge a Desertion, if any Impediments do intervene, so that the Party appealing cannot prosecute this his Appeal, the said Impediments ought to be alledged, and made appear what they are, (as at the Eighth Number last foregoing) in order to hinder the Appeal from being deserted, and like as the Party Appellate may alledge the Desertion of the Appeal for not being prosecuted within the Term of the Law; so also may he alledge the Desertion of the Appeal for not being prosecuted within the *Terminum hominis*, or the Time assigned for that Purpose by the Inferior Judge; in both which Cases also, the Party appealing may alledge and urge those Impediments, mention at the Eighth Number of this Sect. in order to hinder the Appeal from being deserted.

S E C T. 3.

1. *Of any Inhibition with an Absolution, in what Order granted and executed, &c.*
2. *The Form of the Proctor's Petition, (before the Judge to whom it is appealed) in order to obtain this Inhibition with the Absolution, and the Manner of drawing the Act of Court thereupon.*
3. *Of a simple Absolution, or an Absolution made absolutely, and not to a Day.*
4. *In what Case the Contumacy Fees are to be deposited at the Acts of Court, before the Absolution is granted.*
5. *Of Things attempted to be done by the Inferior Judge after the Inhibition.*

1. **S**OMETIMES the Judge from whom it is appealed, in that Sentence which he pronounceth against the Party who is cast, or perhaps after the said Sentence is pronounced, doth Excommunicate the Party against whom he gives Sentence; as in Causes of Temerary Administration; of Defamation (when it is sued upon the Penalty inflicted in the Provincial Constitution) in a Cause of hindering or opposing a Last Will; and sometimes after Sentence, as in Causes for not paying Tithes or Charges, or a Legacy adjudged: Sometimes also the Judge doth Excommunicate a Party, for not obeying his Monitions or Orders which precede the Sentences. And if these Cases it be appealed, then an Inhibition is to be decreed by the Judge to whom it is appealed, not only to inhibit the Judge from whom, &c. and to cite the Party Appellate, (as was spoke in the First Section of this Chapter, at the Fifth Number) but also in the said Inhibition is to be inserted an Absolution from the aforesaid Sentence of Excommunication, until some competent Day to be appointed at the Pleasure of the said Judge. And likewise, in the said Inhibition is to be inserted a Mandate to all Rectors, &c. but the Literate Persons are to be omitted, (though mentioned in the ordinary Inhibition) because Excommunications or Absolutions are not wont to be denounced by any but a Clergy-man: Yet this Inhibition,

Inhibition, in its *Exordium*, ought to be directed in general to all and singular, &c. so that a literate Person may Cite or Inhibit; but in the End of it, it ought to be directed to all Executors as above, to punish the said Excommunication or Absolution, and to denounce the Party appealing to be absolved until a certain Day, &c. and in all Things as in the second Part of this Book, where it is spoke of the Manner of denouncing Excommunications. And observe, That the Party who obtains this Inhibition aforesaid ought to take care, that the Act be drawn upon the granting of the same; and the said Party ought to appeal before the Judge *ad quem*, or at least he ought to alledge in Writing, that it is appealed in due Time and Place.

2. Now the Proctor of the Party appealing, and desiring this Inhibition and Absolution, must appear in this Form: *I N. do Exhibit my Proxy in Writing for M. and do make my Part for the same; I Appeal and desire Apostles, I Complain, Protest, and do all Things as are contained in the present Protocol of Appeal.* (And then let him exhibit this Protocol of Appeal before the Judge to whom he thus appeals, and leave the same at the Act of Court.) Or thus, (if he have appealed within ten Days before a Notary Publick) “*I alledge, That it was appealed by me in due Time and Place, as well from a pretended Definitive Sentence, or from certain Grievances imposed by such a Judge, as also from a certain Sentence of Excommunication inflicted upon my Client; and therefore I desire that the Judge from whom I thus appeal, the Writer of his Acts, and O. the Party Appellate in special, and all manner of Persons else whatsoever in general, may be inhibited, lest (whilst this Appeal or Complaint doth depend undetermined) they or any of them should attempt to do any Thing in prejudice of this Appeal, so as that my Client should not have free Liberty to prosecute the same; and also I desire, that the said O. the Party Appellate, may be cited to appear on such a Day, to answer M. my Client in this his Cause of Complaint, and Appeal.* Then, upon all these Things, an Act is to be drawn by the Register, and the Judge decrees the Inhibition and Citation, as is desired; and then the Proctor swears in the Name

Name and Behalf of his Client, that he will obey the Law, and stand to the Mandates of the Church. Then the Judge is wont to absolve the Party to a Day, and decree Letters Testimonial upon this his Absolution, without paying Charges, unless it be decreed by the Judge from whom it is appealed, for the taking his Body before the Appeal were interposed.

3. Whensoever it is appealed from Sentence of an Excommunication, pronounced in the Definitive Sentence of the Judge from whom it is appealed, or before or after his Sentence, though at the Time of granting the Inhibition the Absolution be made to a Day; yet by the Stile of all the Courts of the Most Reverend the Archbishop, (Time out of Mind) it hath been used, that so soon as the Party appealing gives in his Libel, he is to be absolved from the said Sentence of Excommunication absolutely: And though it is often alledged, That this simple Absolution ought not to be made, otherwise than from one Day to another, (*viz.*) until the End of the Suit, that if by the Sentence of the Judge to whom it is appealed it should be pronounced, that the Party hath unjustly appealed, the said Party should continue in that State or Sentence of Excommunication, already inflicted by the Judge from whom it is appealed, which otherways could not be if he were simply absolved; yet hath it been often adjudged for this Stile or Custom, (*viz.*) that the Libel being given, the Party appealing is to be absolved absolutely.

4. If any do not appeal from the Sentence of Excommunication before he hath stood Forty Days (from the Time of denouncing the same) Excommunicate, and is signified in order to the taking his Body: In this Case, the Party desiring the Absolution is not to be absolved, until he first deposite into the Hands of the Register such Contumacy Fees as are to be taxed by the Judge*. And what these Expences are, Mr. Clarke says, you must read Titule (*Quæ expensæ dicuntur expensæ Contumaciæ*), and there you may be fully informed: [It's likely you may so

* *Ha expens. fusius traduntur in secunda parte hujus libri, part. 2. c.*

3. Sect. 3. n. 3. & alibi. Haud vero hujus tituli particularis, harum expensarum mem. Lanfr. autem c. de expensis, n. 22. & usque ad finem. etiam. ab Alciat. de exp. fol. 192. (quod bene nota usque ad finem fol. 193.) sat ample traditur.

you can find it, but I am sure I find not such a Title in his Book; therefore I refer you to *Lanfranc, Alciatus*, and others.] Yet because it doth not appear to the Judge that Charges were made by the adverse Party until the said Party appear, therefore the Proctor who desireth the absolution ought to give Bond, or to swear, That (over and above the Sum deposited at the Act of Court) he will pay all manner of Charges which shall afterward be taxed by the Judge; in which Case the adverse Party may inform himself of other Charges besides the Sum taxed: and also it ought to appear to the Judge, whether or no there were Letters of *Significavit*, in order to apprehend the said Party appealing; which if so, they ought to be acknowledged, and Letters of *Significavit* ought to be made to the King, in order to release the said Excommunicate Person, &c.

5. If (after the Inhibition is executed upon the Judge, after it is appealed from his Sentence in the Acts of Court, or whilst the Term which is given to prosecute doth depend, or whilst the Term which is allowed by the Law for that purpose doth depend, (*viz.*) Ten Days, or the Time allowed by the Statutes of this Kingdom, (*Scil.*) seven Days) the Judge from whom it is appealed doth interpose any Decree, which is prejudicial to the Party appealing in any respect, to wit, If he doth Excommunicate him, or doth make any manner of Assignment any way prejudicial to the aforesaid Party appealing; or if the Party who obtaineth Sentence (after the Appeal is interposed from the said Sentence in his Presence, and after he is sensible that both he and the Judge are inhibited, or whilst the Time for prosecuting this Appeal is in dependence as above) doth attempt any Thing in Prejudice of the Appeal: Then the Proctor appealing ought to alledge before the Judge, (to whom he appeals) That he did appeal in due Time and Place from the Definitive Sentence pronounced by the Inferior Judge in such a Cause, and against such Persons, or from certain Grievances, &c. and also that the said Inferior Judge from whom it is appealed, and the Party Appellate, were inhibited in due Time and Place, by Vertue of an Inhibition taken from this

† *Lauf. de Ap.*
n. 76. plures
ponuntur casus,
circa attentat.
an. 76. ad
num. 80. quando
possint seu non
possint revoca-
ri. Quæ sunt ob-
servatu dignæ,
Wesemb. parat.
ff. l. 49. t. ni-
hil novari, n. 3.
Robert. Lancel-
lot. tract. de
attentat. & in-
novat. p. 1. in
Præf. n. 20.
Gail 1. O. 147.
n. 1. & O. 148.
Tusch. tit. A-
con. 542. Jacob.
Blum. processus
Cameral. tit.
35. n. 20, 21,
25.

this Court, as may appear fully by the Certificate made thereupon, and remaining in the Custody of the Register: And that notwithstanding this Inhibition, the said Judge from whom it is appealed hath proceeded in the said Cause, attempting against the said Inhibition: And here he must express particularly what those Things are, which are so attempted by the Judge and the Party: And then he must desire, that these Things so attempted may be revoked in the first place. Then (if these Things so alledged are not denied by the Party Appellate) the Judge, to whom it is appealed, † ought to revoke the said Things so attempted to be done by the Inferior Judge, &c. as aforesaid; for this Allegation, touching the Revocation of the Things attempted, &c. is wont to be made in the Presence of the Proctor of the Party Appellate. But if the Matters so alledged are denied, then they ought to be proved by the Acts of the Court of the Judge from whom it is appealed, and the Certificate of the Inhibition: Or else by Witnesses, if the Things so attempted to be done were attempted out of Court by the Party Appellate, and then they are to be revoked as above, and the Party so denying them is to be condemned in Charges, which the Party appealing is put to in the proving the same. The Party appealing may also call the Judge, from whom he appeals, to answer in a Cause of Contempt, and may object the Premises; and if the Things attempted (as before) are made appear, the Judge to whom it is thus appealed ought not only in the first place to revoke all and singular the Matters and Things so attempted, but also (if it is requested) he ought to condemn the said Judge for attempting, and the Party Appellate, in such Charges as are made, and also punish them at his Pleasure. And observe, That if the Party appealing will proceed in this Business about the Attempts, he is not compelled to prosecute or proceed in his Cause of Appeal, until the Attempts are first discussed and retracted; at least that ought to be first requested, lest he seem to recede from them: Yet the said Party appealing ought to take Care that his Appeal be not deferred, whilst he is prosecuting his Cause of Appeal.

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attempts; which inconvenience, he may easily remedy, having liberty to proceed in both together.

S E C T. 4.

1. *The Form of the Party Appellate his Appearing, and desiring a Libel, &c.*
2. *The manner of dismissing the Party Appellate with Charges, if the Party Appealing being cited to Prosecute, doth not appear.*
3. *The manner of Alledging that the Appeal is deserted.*
4. *The manner of deserting the Appeal, if it be not Prosecuted and Certified, within the Term or Terms, assigned by the Inferior Judge, for that purpose. And what Causes may be objected to hinder such desertion.*
5. *The manner of deserting the Appeal, if it be not ended within the first Year, and the Petition thereupon.*
6. *The manner of giving a Libel in these Causes, and desiring a monition to Transmit the Proceedings and a Term Probatory.*

THe Party Appellate being to appear, his Proctor appears before the Judge, to whom it is Appealed, on this manner, 'I. M. under Protestation of not consenting to the Judge of this Court, as a Competent Judge on my Clients behalf, nor Proroguing his Jurisdiction upon any account, further than by Law I am bound, (and this my Protestation being safe and accounted as repeated in all Acts or Things, done and to be done) I exhibit my Proxy in Writing, or at the Acts of Court (if he be constituted so) for N. the Adverse Party, and I make my part for the same; and I desire a Libel, or else that my Client may be dismissed, and the Cause remitted to the Judge from whom it is Appealed, together with Charges. And then the Party Appealing must either give in a Libel, or else he must give time until the next Court-Day, in which to give his Libel: And observe that the aforesaid Protestation is very requisite, lest the Party Appellate, should seem to consent to the Judge, to whom it is Appealed.

2. If in case the Proctor Appealing, hath been Lawfully cited to Prosecute his Appeal, the Proctor of the Party Appellate, must draw a Certificate upon the Citation, which was taken out to that effect, (according to the usual form of Certifying them) and upon the Day mentioned in the Citation, for his Appearance, the said Proctor of the Party Appellate, must (under the aforesaid Protestations) Exhibit the said Original Mandate, with the Certificate thereupon, and he must accuse the Contumacy of M. the Party pretending an Appeal, being cited to appear on this Day, in this Place, in order to Prosecute his Appeal under Penalty of final dismissal, and remission of the same, to the Judge from whom it is Appealed, and of dismissal of the Party Appellate, and also under Penalty of condemning him, the said Party Appealing in Charges made and to be made on the part of the said Party Appellate; then the Judge causeth the said Party Appealing so cited as aforesaid, to be called (by the Crier of the Court, that is, the Apparitor, or Beedle, or in his absence any other) three times publickly; and if he appear not, then the Judge at the Petition of the Proctor Appellate aforesaid, doth Pronounce the said Party Appealing to be Contumacious, and in Penalty of such his Contempt, he doth dismiss the Party Appellate with Charges, and doth remit the Cause back to the Judge, from whom it was Appealed, and doth licence him, to proceed in the principal Cause, begun before him notwithstanding the Inhibition, which was taken out by his Authority. And then the Judge, at the Petition of the Party Appellate must Tax the aforesaid Charges, to the sum of Thirty Three Shillings, Four Pence, and Decree Monition for the payment of these Charges, &c. and oblige, that in this Case, (*viz.*) for the not Prosecuting this Appeal, and by the Style of all the Courts of the Archbishop, it hath been used (time out of mind) that no Schedule of Charges is offered, nor any Oath Administred upon the Taxation of these Charges, as in other Taxation of the Charges of Sute; but *quere*, how far this Custom of the Court, is available against the Laws, who say that a Taxation of Charges, without an Oath is void. Though Mr. Clark saith, he never saw the Case controverted.

verted, that is, as to the omission of the Oath, upon the Taxation of these Charges, which are thus said to be due, by the Style of the Court.

3. The Pro^{sec}utor or the Party Appellate, being to alledge that the Appeal is deserted, must say on this manner; 'I do alledge that the pretended Appeal, interposed on the part of N. in this Cause, is deserted, referring me to the Acts of this Court, and to the Laws: Wherefore I desire, that first, and before all things, this Appeal may be Pronounced for deserted, and that the Cause may be remitted to the Judge from whence it was Appealed, together with the Charges. Then the other Party denieth these things, (so alledged by M.) to be true, and doth protest as to the nullity of them, and desires that Sentence may be given in the Cause. Then the Judge assigneth to hear his pleasure upon this desertion, against the next Court Day, and may likewise assign to hear his Sentence then too, if it be desired of him, and if the Cause be not deserted: And may so often assign to hear his pleasure thereupon, until he be informed as to the Acts of Court, and the Law: And if the Appeal is deserted, then must he Pronounce so, either with the Living Voice, at the Acts of Court (which is called an Interlocutory Decree) or by his definitive Sentence: If it be by the Interlocutory Decree, then the Judge saith thus, 'We Pronounce the Appeal interposed by N. to be deserted, and we remit the Cause to the Judge, from whom it was Appealed, together with Charges, and we condemn the said Party Appealing, in those Charges. And then a Schedule of Charges being offered, the Judge must Tax these Charges, and Decree a Monition, as was said, when the Sentence is to be put in Execution.

4. Now although by the Law, a Year be given, in which to Prosecute, and Determine an Appeal (which is called the *Primum Fatale*) yet the Judge from whom it is appealed, may abbreviate this Year, † as to the Prosecution thereof; and so soon as it doth appear to him, that an Appeal is interposed from his Sentence, he may appoint the Party Appealing, a time to Prosecute the same, if the Adversary request it: And like as the Appeal is deserted, if the Party Appealing doth not Prosecute it, within the Term

† De verb. sig.
a Sebast. Alm.
verb. Appella-
tio, Sect. 11.
Ordo. Cam. p. 2.
tit. 30. Myns.
cent. 2. Obs.
15. 22.

allowed by the Law, for that purpose; so likewise, if he doth prosecute the same within the Term appointed by the Judge for that purpose, it may also be said to be deserted. There may be many Causes or Impediments urged, in order to hinder this desertion, and get the time or the *Fatale Furis & hominis* Prorogued: Of which Causes was spoke at large, in the second Paragraph of this Chapter, at the Eighth Number.

** In the Courts of the Lord Arch-bishop of York, all Causes of Appeal have the same order and method in the proceeding, as Plenary Causes have, from the giving in of the Libel till Sentence. Lord Cholmondsey his Appeal, &c. and several others whether the said Appeals were Testamentary, i.e. Summary Causes or Plenary Causes in the first Instance, as may appear by any Lord Cholmondseys Appeal, and one Beesly against St. George Middleton of Richmond. 2 of August. 1664. Sute is contested, &c. Lanfranc. c. quoniam. de interloc. & Appeal. n. 88.*

5. Seeing the Laws do say, that an Appeal ought to be determined within the *Primum Fatale*, that is, the first Year, or otherways the same to be deserted. Therefore let the Proctor Appealing take care, (though he have Appealed in due time and place, and hath caused the Party Appellate, to be cited to answer in a Cause of Appeal, and hath got the Proceedings, of the Judge from whom he Appeals, transmitted) that he insist, to have the Cause concluded, and to that end, that he often do call upon the Judge to Pronounce his Sentence thereupon, or else let him however protest his Diligence in that behalf, which if he doth not, the Party Appellate may alledge that the Appeal is deserted, and the Judge ought to Pronounce upon that first Article of desertion.

6. After both the Party Appealing and the Party Appellate do appear by their Proctors, before the Judge to whom it is Appealed, the Party Appealing must (in their usual and ordinary form of Words) give in his Libel, and desire that it may be proceeded summarily, & *de plano*. And in all things, it must be Decreed by the Judge, and Requested by the Party, as above, where the Libel is given into Court, in the first instance, *this only being excepted, that before the assignment of the Term Probatory, the Party Appealing may desire that a Monition may be Decreed against the Judge, from whom it is Appealed, and the Writer of his Acts, to cause them to transmit before the Judge (to whom it is Appealed,) against such a Day, the whole Proceedings, and all Things whatsoever acted and done (before the said Judge from whom, &c.) in the Cause; which the Judge Decrees, appointing a certain Day for transmitting the said Proceedings. Then the Party Appealing (or if he doth not, the Party Appellate) may ask

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ask a Competent Term to be assigned to prove the said Libel; to which purpose, the Judge appoints the Court Day, following the same Day, which was appointed for transmitting the Proceedings. And here it is to be observed, that every Cause of Appeal retains the nature of the principal Cause, as it was Instituted before the Inferior Judge, and ought to be proceeded in the same method, as well in the Contestation of Sute, as in the Conclusion of the Cause, (*viz.*) Summarily in Summary Causes, and Plenarily in Plenary Causes: Though this faileth in Causes of Appeal, before the King's Delegates, * for by the * *Lanf. c. quo-* King's Commission, the Cause is so Delegated, that they *niam, n. 12. per* may proceed Summarily in it. And these Judges were *tot.* wont to proceed so always, though the Original Causes were perhaps Plenary.

S E C T. 5.

1. The manner of Exhibiting the Proceedings of the Judge, from whom it is Appealed, before the Judge to whom it is Appealed: And Taxing the Charge of transmission.
2. The manner of Compounding with the Register of the Judge to whom it is Appealed, for inspecting the Proceedings.
3. The order in producing Proofs in these Causes of Appeal.
4. The manner of Exhibiting the Instrument † of Appeal † *Species Instrumentorum supra traditur in part. 3. Sect. 7. n. 2.* read before the Judge ad quem in presence of the Proctor of the Party Appellate.
5. The manner of Exhibiting an extrajudicial Instrument, or one made out of Court.
6. What Solemnities are required, that a publick Instrument be made Authentick.
7. Who ought to keep the Appeal after it is read.
8. In what case an Instrument makes no Proof, unless the contents of it be proved.

THE Proceedings of the Judge, from whom it is Appealed are to be Exhibited before the Cause is concluded, (*viz.*) some of the Proctors of the Court (if the Register of the Judge from whom it is Appealed, be not present) who is not a Proctor in that Cause in which the Proceedings are to be Exhibited, must (in a form of Words) on the behalf of the said Judge from whom, &c. and of the Writer of his Acts present these Proceedings. Then the Proctor of the Party Appellate, or perhaps some other Proctor, who is particularly instructed by the Register, is wont to take care, that the Judge do Tax these Proceedings (that is) that he write at the end of them, what sum the Party, at whose Instance the Proceedings were transmitted ought to pay to the Register of the Judge, from whom it is Appealed, for the transmitting or writing the Proceedings, thus transmitted: And then he must desire a Monition may be Decreed against the Party Appealing, for the payment of the sum Taxed, upon some certain Day to be appointed by the said Judge, for Taxing the same.

* *Panorm. abb.*
in Consil. vol. 1.
con. 2. Sect.
Item etiam
præmitto.

2. Seeing an Appeal from Grievances, * ought regularly to be proved or justified, by the Proceedings themselves, and the Acts of the Judge, from whom it is Appealed; and although some Matter, or Allegation were given (in a Cause of Appeal from a definitive Sentence) before the Judge to whom it is Appealed, by the Party Appealing, and the Party Appellate, and it is not known either to the Parties in contest, or the Judge, which was first given in, and whether or no, Witnesses were produced and examined upon such Matter, and their Sayings and Depositions published, unless by inspecting the Proceedings of the Judge from whom it is Appealed: And seeing also if the whole Proceedings, are not truly and fully transmitted, or if they are vitiated or corrupt in any thing, (as it sometimes falls out) then this cannot appear, unless the Proceedings of the Judge from whom, &c. be inspected: And because also informations in matter of Fact, (that is, as to the manner of proceeding, and the things alledged, propounded and proved, in the first Instance) cannot be given by

the Advocates or the Judge to whom it is Appealed, that so Sentence may be pronounced in the Cause, unless the Proceedings of the Judge from whom, &c. be inspected; lest therefore the Parties, either Appealing, or Appellate, should (to their great Charge) be compelled to get these Proceedings Writ out, or Exemplified, and lest the Proceedings should be stopped in prejudice of the Parties (in Sute) until the same be so Writ or Exemplified: Therefore to avoid these Charges, and the said Delays, the Parties are wont to compound with the Register of the Judge, to whom it is Appealed, for an inspection into these Original transmissions, on this manner (*viz.*) the Party Appealing (seeing the Proceedings were transmitted up to this Superior Judge, at his Charge) is wont and ought to pay for the inspection, into these Proceedings, a fourth part of the sum Taxed (as is aforesaid) for the transmitting the same: But the Party Appellate, because he paid nothing for the transmitting the Proceedings, is wont to pay a third part of the said sum Taxed. And lest the Party Appealing, (having taken care perhaps to get the Proceedings aforesaid, to be delivered to him) should detain the same, so long in his custody, so that the Party Appellate can scarce get opportunity to view the same; and so contrarily the Party Appellate, should get them into his Hands to peruse, and doth keep them so long, that the Party Appealing has not an opportunity to peruse them: Therefore the Proctors of the Parties so perusing these transmissions, are wont to lay in a Bond to the Register, (or a Pawn, or some Testimonial under their Hand, (*viz.*) a Subscription under their Hand, in a certain Book kept by the Register for this purpose) that upon such a Day, such a Proceeding was delivered to him, and that he will restore the said Proceeding, when it is required of him: And if either of the Parties (being requested so to do) doth delay to deliver the same, the Judge is wont to deny Audience in the Cause, until it be done: And if he is Contumacious, and refuseth peremptorily to do it, he ought to be Excommunicate for this his Contempt. Or if the Proceedings are detained by any other Proctor, then the Judge is wont to suspend him, from Executing his Office

as Proctor, in any Cause whatsoever, until he bring in these Proceedings.

3. In a Cause of Appeal from a definitive Sentence, it is Lawful both for the Party Appealing, and the Party Appellate, to alledge things not alledged before the Judge, from whom it is Appealed; and to prove things not proved, so as the publication of the Witnesses produced in the first instance, hinder not. But it is otherways in a Cause of Appeal from Grievances, which ought to be proved, by the Proceedings, and the Act of the Judge, from whom it is Appealed; unless the Grievances upon which it is Appealed, are omitted, and left out of those Proceedings so transmitted, or that the Judge, from whom it is Appealed, or his Register, hath refused to enter these Grievances into the Acts, which the Party Appealing supposeth himself grieved upon.

† *Publica Instrumenta dividuntur in judicialia quæ videlicet fiunt apud acta & in judicio; quæ hic intenduntur.*
Wesemb. parat. ff. de fide Instr. n. 2. col. 887.

lit. c. de verb.

signif. verb. Ap.

pellatio Sect. 17.

a Sebast. Alm.

mers. Baldus.

in rub. Cod. de fide Instr. n. 4. 5.

* *Instrumenta usq; ad conclus.*

in Causa exhiberi possint.

Wesemb. ubi sup. n. 5. col.

893. lit. D. cap.

cum dilectus 6.

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part. 6. n. 26.

cum seq. Alciat.

de Inst. ed. Sect.

& quando sint

exhibenda.

† *Wesemb. ubi*

supra. de verb.

fig. ubi supra, a

Sebast. Alm.

Sect. 17 & Sect.

15. ubi bene

nota.

4. Though the Appeal were read and interposed, before the Judge, to whom it is Appealed, at the time of granting the Inhibition, as is frequently done, when it is Appealed from an Excommunication, and this Appeal remaineth at the Acts of Court (that is, in the custody of the Register of the said Judge, before whom he Appeals) yet seeing it was read in the absence of the Party Appellate, it is necessary that this Appeal be Exhibited in Court, before the Cause be concluded, * in presence of the Adverse Party therefore the Proctor of the Party Appealing, must (in his usual form of Words, acquaint the Judge, that in supply of the Proof of the Contents of his Libel, already given in by him in this Cause, and also to found the Jurisdiction of the Judge of this his Appeal, he doth Exhibit the Appeal already by him interposed in this Cause, and remaining at the Acts of this Court, that is, in the custody of the Register. And observe that in this Case, there is not any Allegation, or answer of the Proctor of the Party Appellate required.

5. Also before the Cause is concluded, the Proctor of the Party Appealing, ought to take care that this Appeal, (though made out of Court, † and read before a Notary Publick, and drawn into the form of a publick Instrument, by the said Notary Publick, that is, being Exemplified by

him) be of the P in by his diction c alledge Instrum lick, and as such a acted and ner and f Allegati Justice m repeated Proctor Instrum lick alled of the I have been or of th hath faith an Answer Party Ap But if th Court Da Appellant the Notar Appealing one, then ther he be ing the pu of the said culties. W it is very Proctors, own and a well deny ty Appeal ner and for deal. But i hath been

him) be Exhibited, according to the usual form, in supply of the Proof of the Contents of the Libel, already given in by him in this Cause, and in order to found the Jurisdiction of the Judge to whom he Appeals : And he must alledge that the Notary Publick, by whom this publick Instrument is signed, is an Honest and Lawful Notary Publick, and that he is commonly reputed and taken for, and as such an one, and that all and singular the Premisses, acted and done, are true, and that it was Appealed, in manner and form as is contained in the said Instrument ; which Allegation of his he must desire may be admitted, and that Justice may be done, &c. which being so admitted, and repeated in full force of its Positions and Articles, if the Proctor of the Party Appellate, doth not confess that this Instrument is Subscribed, and signed by the Notary Publick alledged, (for the confession of such Subscription, &c. of the Instrument by a Notary, proveth the Appeal to have been made as is therein contained.) Then the Proctor of the Party Appealing, is wont to Swear, that he hath faithfully put this Allegation, and doth desire that an Answer may be given thereto, by the Proctor of the Party Appellate, against the next Court, upon his Oath : But if the Proctor of the Party Appellate, on the next Court Day, doth deny these things thus alledged by the Appellant, or at least, if he answereth that he believeth not the Notary, or rather that the Person, (whom the Party Appealing pretends to be a Notary Publick) is such an one, then the said Party Appealing ought to prove whether he be so or not, which may easily be done by Exhibiting the publick Instrument, obtained (upon the creation of the said Notary) under the Seal of the Court of Faculties. Which publick Instrument, seeing the Seal put to it is very Authentick, and sufficiently known to all the Proctors, the Proctor of the Party Appellate, is wont to own and acknowledge this Seal (for no Honest Man can well deny it,) and this Confession is sufficient for the Party Appealing, to prove that it hath been Appealed in manner and form as is Specified in the said Instrument of Appeal. But if the Notary who Subscribed this Instrument, hath been Notary for ten Years together, and has been known

known to the Court and the Judges as such (having drawn sundry publick Instruments of the like nature and Exhibited them, and left them at the Acts of Court, of the said Judge, or if he has been reputed as an Honest and Lawful Notary Publick, for that time, it is sufficient that the aforesaid publick Instrument be Exhibited by the Party Appealing, and that he do alledge as above, and that will make proof of it self, without the Confession of the Proctor of the Adverse Party, nay although the said Proctor doth deny both the Allegation and the publick Instrument aforesaid: And this Mr. *Clarke* says he hath often seen and known practised, in Causes where he was concerned. And here the Proctors Appealing are to be admonished, that though it be use, that (when the Instruments of Appeal are Exhibited) the Party Exhibiting this Instrument is wont to alledge, all and singular the things contained in the same are true, and were done and acted, as is therein exprest, as before: Yet if that Instrument and Allegation, were denied by the Proctor of the Party Appellate, then the Proctor Exhibiting this Instrument, and making this Allegation, may refuse to take his Oath that he hath faithfully put this Allegation, and that all and singular the Matters and Things contained in the said Instrument are true, and were so acted and done, as is there exprest. However let the Proctors take heed for the future, how they alledge those Words last recited, especially let them beware how they Swear as to the truth of them; for the tenor of the whole Appeal is wont to be inserted in the said Instrument of Appeal; which if so, Mr. *Clarke* Appeals to their Consciences whether or no, all the Grievances, the Iniquities, the Nullities and those pieces of Injustice, inserted in the said Appeal, (which they pretend are inflicted upon them, by the Judge from whom they Appeal) are true, that is, that they are really inflicted by the said Judge, and imposed as is contained in the said Appeal? And if they are not true (as often falls out,) then with what Conscience, can this Oath be taken by the Proctor alledging the Premises, (*Scil.*) that he hath faithfully propounded the same, and that the things contained in that Instrument are true? Therefore for the future, let them omit those general Words, as

above mentioned, and alledge only that the publick Instrument was Exhibited, and is Subscribed with the proper name, and the wonted Seal of N. the Notary : And that the said N. was and is an Honest and Lawful Notary Publick, and is commonly reputed and taken to be such ; and that the Appeal mentioned in the said Instrument was made and interposed, before the said Notary, in the Day, the Month, the Year, the manner and form Specified in the said Instrument : And if as is above said, the Proctor of the Party Appellate, do either confess that the Instrument is subscribed by the Notary, as is alledged, or doth deny the same as before ; yet if the Party thus alledging and Exhibiting doth make appear that the Person Subscribing the said Instrument, is a Notary Publick, or that he hath stood in the state of a Notary, for ten Years together, as above, when the intention of the Party Appealing, is sufficiently founded : *Viz.* that it was Appealed on his behalf in due Time and Place, in this Business, and that the Matters or Things contained in this Appeal, ought to be justified by the Proceedings of the Judge, from whom it is Appealed, or otherways, as is spoke afterwards.

6. Now this Extrajudicial Appeal, or rather the Instrument *made upon an Extrajudicial Appeal, ought first to be directed to all faithful Christians. 2. It ought to be drawn in the name of the Notary Publick, before whom the Matters contained in this Instrument, were acted and done. 3. The Year of our Lord, and the King, the Day of the Month, and the Place, (in which the said Matters contained, were done and dispatched) are also to be inserted. 4. Witnesses are to be present, at the time of dispatching the Premises, whose Names are to be Specified in this Instrument, with their usual Habitations, that so if these Instruments are doubted, the Witnesses may be found. The name and surname of the said Notary, who draws this Instrument, ought also to be inserted, and by what authority he was created Notary, and where he was born, and if there are many Notaries of the same name, it ought to be Specified particularly, which of them it is, who hath Subscribed this Instrument. 6. Also the Sign or Signet of that Notary, is also to be put to this Instrument : For every

**De materia in qua debent Instrumenta scribi, in qua forma & quæ solennitates requiruntur, plenius de hisce reperiatur, mentionem apud Wesemb. parat. ff. n. 4. 5. de fide Instrum. Alciat. prax. de Instr. editione. Sect. qual. publicetur, & quæ ad solenn. Instrumenti requiruntur, specul. in tit. de Instr. editione. Sect. breviter. Lanf. c. quoniam de Instr. n. 5, 6, 7, 8. Angel. in Auth. de tabellion. Alexand. Conf. 64. vol. 4. Ferra. in forma product. Instrum. in princip. omnibus solenn. hic recitata a D. Clarke late enumerantur ab authoribus supradictis.*

every Notary hath some certain, and particular Seal, that by looking thereupon, although the Notaries Hand be uncertain, yet it may appear by the Seal it self, what Notary drew that Instrument. 7. At the end of this publick Instrument, the Notary is wont to testifie, that he was especially requested to draw up this Instrument. 8. And Lastly, He must also testifie, that the aforesaid Witnesses mentioned, were requested to give their Testimony: And it is expedient that the Notary take care, that the Witnesses do put their Hands to the Protocol of Appeal, (that is, the Original Appeal, which the Proctor reads and interposeth, and upon which this Instrument is made) that so if it be afterwards doubted, whether or no this Appeal were interposed, the Witnesses having viewed their Hands, may easily recollect, whether they were present at the Premises yea or not: And these Solemnities we are to understand, as peculiar to all publick Instruments.

7. But one Corruption (Mr. Clarke observes) hath crept in now adays; which is, that when the Proctors of the Party Appealing, do Appeal out of Court, before a Notary Publick, after the Appeal is read, or interposed, they take care to get the same Subscribed, and then take it into their own custody, and keep it until they are necessarily compelled to exemplify the same, into the form of a publick Instrument; by means of which their keeping it, they may easily add to, or Subtract from this Appeal, in prejudice of the Party Appellate, which in all probability they could not do, if the said Appeal were left in the Hands of the Notary; nay it may also possibly injure the Party Appealing, when the said Appeal is not left in the custody of the Notary; for admit the Notary do Die before this Appeal is Exemplified, and drawn into the form of a publick Instrument, how can a publick Instrument be drawn upon the same afterwards? Whereas had this Appeal been found in the custody of the said Notary, amongst his other Writings, and Instruments of the same nature, at the time of his Death, then a publick Instrument might have been drawn upon it. For Notaries are bound, and are wont faithfully to keep all Writings, and things done by them: And it is to be noted that in such case, where the

the Notary doth Die as aforesaid, some other Honest Notary, (if he finds that this Appeal is faithfully kept as above, in the custody of the Notary so Dead, and doth know very well, the Hand Writing, the Subscription and the Signet of the said Notary) he may at the Petition of the Party concerned, Exemplify, and draw up a publick Instrument, touching the finding of this Appeal, Witnesses being also requested to be present, at the time of looking for finding the same; which Witnesses are also to be named in the said Instrument: And this Instrument Mr. *Clarke* affirms is valid, and that he hath known it adjudged for Years ago.

8. If the Instrument wants any of the Solemnities † a-^{† Quibus Instr. fides sit adhibenda, & quantal, & que exceptiones contra eadem oriri possint, piene notatur in Authent. de fide Instr. Sect. si vero moriantur ex. eo. c. ex literis Alciat. de Instr. ed. Sect. Quibus. Wessem. parat. ff. de fide Instr. n. 8. Speculator de Instrum. & Sect. repet. in princip. & Sect. ostensio. Ferrariens. in forma oppon. contra Instr. per tot. Lanf. in c. quoniam de Instr. prod. n. 49. usq; ad finem ubi bene nota de hac re, Schuffius conf. 56. cent. 1.} foresaid, it makes no proof, neither can it be said to be publick, if it be rased or interlined, in any substantial Matter, (*viz.*) in the Names of the Parties, in the date of the Year, the Day of the Month, or if the Notary Publick who drew this Instrument, be one of the Family, Household, one clothed by, or a Father, Son, or nigh of Kindred to the Person interposing the Appeal, in whose favour the Instrument is drawn; this Instrument makes no proof of it self, if the adverse Party deny it, and if the foresaid Defects appear, by inspecting the said Instrument; or if the Adversary do alledge, and prove, that the said Notary who drew this Instrument, was not an indifferent Person, for the Causes aforesaid. Therefore lest your Client should lose his Cause upon this account, (if your Adversary do prove the Matters aforesaid, objected against the Notary) yet if it be true, that the said Appeal was read and interposed in due time and place, then you must prove the same, (as also the Rasures, and Interlineations foresaid, (by the Witnesses who were then present: And for this reason as is above said, it is very necessary, that the Witnesses do Subscribe their Names, to the Protocol of Appeal. If the Notary at the end of the Instrument, doth testify that that was done by him, and that he doth thereby make the same so appear, and doth protest himself ready so to do, that so all suspicion may be removed; in this case all suspicion is removed, and credit is to be given thereto; but we must understand this as to a Lawful

ful Notary Publick only : For it is otherways (as was said before) in a Notary Publick, who is not an indifferent Person, for then the Interlineations and Rasures are to be proved by the Witnesses, otherways the Instrument availeth not.

S E C T. 6.

1. *In what case the Party Appellate, (though Sentence is given against him upon the Appeal) yet is not to be condemned in Charges.*
2. *In what case, and when there ought to be a composition of the Charges in these Causes.*
3. *The Judge of the Appeal, though he gave a Remissory Sentence, on behalf of the Appellate, yet may be after the Cause is remitted, Tax Charges, and Execute his Sentence as to those Charges.*
4. *The tenor of a Remissory Sentence, with a Condemnation, and a Taxation of Charges, and an Excommunication in the same, if the Party being admonished takes no care to pay the said Charges.*
5. *The manner of executing the said Monition, and denouncing the Excommunication, laid in the said Sentence.*
6. *The manner of renewing the said Decree to pay Charges, or the Matter adjudged, by the Sentence.*
7. *It is Lawful to complain of the nullity of a Sentence, or any other nullity before the same Judge : Who he revokes not that nullity, what remedy.*
8. *The nullity of a Sentence, or other Acts of the Superior Judge, may be alledged before the Inferior Judge.*

IF I obtain Sentence on my part in the first instance, by the Depositions of the Witnesses, who make full proof of my intention, and if the Adverse Party (having just exceptions unknown to me,) doth not prove them in the first instance, but in the second ; he shall not obtain the Charges expended, either in the first or second instance. For it is sufficient that he do obtain the principal Cause

and that he be excused from Charges; but it is otherways, if the Party Appellate doth give exceptions against these Witrnesses, and doth not prove them. Likewise if the Party Appealing, shall obtain a Sentence, upon new proofs (made in a Cause of Appeal) which respect not the merits of the Cause, he shall not obtain his Charges of the first instance; because the Party who obtained Sentence in the first instance, is presumed in good esteem, and may insist for the defence of the Sentence pronounced on his part. But this faileth, if the Party Appellate, were in bad esteem in the beginning; that is, if that defence, which is proved by the Party Appealing, in the second instance, were known before to the Party Appellate: To wit the payment of a Legacy, or the Tithes Sued for in the first instance, by the Party Appellant, in this case the Party Appellate, ought to be condemned in Charges made in both the instances, though he probably obtained Sentence on his part, in the first instance.

2. If the Plaintiff obtain Sentence in a Cause of Tithes, for a greater sum, or for more Tithes, than those which are proved, either by the Confession of the Party, or the proofs of the Witrnesses, the Defendant hath just cause of appealing, and these things being proved, he shall obtain sentence, in which Appeal, the first Sentence shall be retracted, as to these excesses; but as to the just Tithes, shall be condemnatory: In this case therefore it seems, that seeing the Party Appealing had just cause for this his appeal, he ought to have his Charges he is at about the appeal, but not those expended in the first instance: The reason is, because he did not offer that sum, or those tithes, which was really due, after the Sentence was pronounced in the first instance; and therefore he may be accounted malicious, and fraudulent, seeing he never offered that which was really just and due. And so on the contrary it seems, that the Party obtaining this Sentence, for a greater sum than that which was justly due, and not renouncing this greater sum, *so soon as he knew that it was Appealed (from the Sentence) by the Defendant, but persisting in the Sure, he is also in fault, and may be supposed to stand Sure, out of an intention of

Malice,

**Plus petens olim cadebat in causa. Myns. Inst. de Action. Sect. si qui. Quot modis quis dicitur plus petere, Sect. plus autem, ibid.*

Malice, and Injury, and ought therefore to be condemned
 † De compens. in Charges; therefore in these Cases, a † compensation of
vide Lanf. in c. quoniam, de expens. n. 12, 13, 14. si lata sit Charges is to be made, for both of them deserve to be
 punished. Let the Proctors therefore beware, in these Ca-
sententia Con- on, and Prosecution thereof, he do protest expressly, that
demnatoria in he will acquiesce in the Sentence, as to such Tithes, or
centum, & victus Appellet, such a value, and that he only intends to Prosecute the Ap-
& judex Ap- peal, as to the excesses aforesaid: And let him offer to the
pellationis so- Judge from whom he Appeals, (or otherways before the
lum condem- Judge of this Appeal, at the first beginning of the Sute)
net illum vict- the sum due: Then let the Proctor Appellate, take care
um in quinqu- that (in the aforesaid Case) he do in the first place, and
ginta, adver- before all things, renounce the benefit of the aforesaid Ex-
sar. ejus (Scil.) cess either before the Judge from whom it is Appealed,
victor debet (and that within ten Days after the Sentence is pronoun-
condemn. in ex- ced, and in the presence of the Adverse Party) or before
pensis, quia ini- the Judge, to whom it is Appealed, upon the Day of his
que ille victor first appearance, and then if the Party Appealing doth
petiit centum contend yet further, he is to be condemned in all the
cum non debe- Charges.
ret habere nisi
50. vide Gail-
Obs. pract. 1. Ob-

152. n. 3. Bald.
 in Authent. ge-
 ner. c. de epis.
 & cler. Specul.
 in tit. de ex-
 pens. Sect. nunc
 videndum.

* Alciat. de ex-
 pensis, Sect.
 quando & qua-
 liter expens.
 condemnatio fit
 facienda. vers.
 Alii vero sen-
 ten. Lanf. in c.
 quoniam, de ex-
 pens. n. 6. &
 num. 21.

3. It is generally held, that the Judge to whom it is Ap-
 pealed, so soon as he hath pronounced his Sentence, and
 hath remitted the Cause back to the Judge from whom it
 was Appealed, his Office doth cease, and is determined
 and he doth cease to be Judge in that Cause; and (un-
 less in the said Remissory Sentence, he hath Taxed Charges
 of Sute, and also in the said Sentence hath also Pronoun-
 ced the Sentence of Excommunication) that he cannot af-
 terward Tax Charges and Compel the Party Appealing
 to pay the same. Yet in this Case Mr. Clarke saith, he
 hath had it adjudged against this Opinion, (*viz.*) that al-
 though in the Remissory Sentence, or in the Interlocutory
 Decree aforesaid, the Judge to whom it is Appealed, doth
 remit the Cause back, to the Judge from whom it was
 Appealed, and doth condemn the Party by the said Sen-
 tence, in Charges, but doth not Tax the said Charges, in
 that Sentence, but doth reserve the Taxation * of them
 yet may he afterwards Tax the same, and Execute his Sen-
 tence in that behalf: For if this is not Lawful in this Case

then admit that in case the Judge, by his Remissory Sentence doth Tax the Charges, and (a Monition preceeding for the payment thereof, upon such a Day) doth Excommunicate the Party Admonished, and refusing to pay the same, as well now as then, and contrarily. But the Party who ought to pay these Charges, doth so abscond, that he cannot be admonished to pay the same, before the Day which is appointed for that purpose is elapsed; in which case the Sentence of Excommunication aforesaid, is almost extinct and determined. May not the Party to whom these Charges ought to be paid, go to the Judge again, and desire this Monition to be renewed, and likewise desire that a new Term may be appointed, for the payment of these Charges? Yes surely he may; and Mr. Clarke saith it is a thing daily practised. Observe that in the second Monition, the Judge cannot Pronounce the Party to be Excommunicate, as well now as then; but an ordinary Monition is to be granted, as in other Monitions for Charges. Admit also that in this case of Excommunication Pronounced in the Sentence it self, the Party be admonished to pay these Charges, and for not paying them, he is Lawfully Excommunicate, &c. and is committed to Prison, by vertue of the Kings Writ, *de Excommunicato Capiendo*, so that the Party to whom these Charges are due, hath been at a great deal of further Charge, besides the Charges Taxed: Cannot the Judge in this case Tax these Contumacy Fees, and compel the Party to pay the same, notwithstanding the remission aforesaid? Mr. Clarke saith he may, and therefore he concludes as above, that notwithstanding the said reason, that the Sentence or Inlocutory Decree were Remissory, without the Taxation of Charges, the Judge may Tax the Charges of Sure, and execute his Sentence in that behalf, so as in the said Sentence or Decree, he hath condemned the Party in Charges. But here it may be enquired, in whose presence these Charges are to be Taxed, for the Proctor of the Party appealing, hath Executed his Office, and it is determined, soon as the Definitive Sentence is Pronounced. There the Party condemned, is to be called * to see the aforesaid Charges Taxed; and then if he do not appear,

* Solvitur hac
questio a Lan-
fran. c. quanti-
am, de expens.
n. 8.

they are to be Taxed in Penalty of his Contempt. Mr. Clarke saith, that he hath had it adjudged thus in this case, (*viz.*) that though the Sentence were Remissory, with a Condemnation of Charges, but without a Taxation in the same, and that if the Judge by the said Sentence, or Interlocutory Decree, hath reserved this Taxation of the Charges, until some certain Day, and this without any interval, and under one context of Words, (*viz.*) 'We condemn N. in Charges, and we reserve the Taxation of them, until the next Court Day, and we remit the Cause back to the Judge from whom it was Appealed) and hath also Admonished the Proctor of the Adversary to be present, to see these Charges Taxed, and a Day assigned for the payment of the same, that then on that Day so assigned, the Judge (in the presence of the Proctor if he appear, or otherways in Penalty of his Contempt,) may Tax these Charges, † and Decree a Monition for the payment of the same.

† Lanfranc. ubi
supra. n. 8.

4. If the Party Appealing do suffer in the Cause, whether by the Acts of the first, or the second Judge, because the Proceedings are not transmitted, as falls often out, or because the Appeal is deserted, the Judge must first Pronounce that the Party Appealing hath made default in the proof of his Libel, and hath unjustly Appealed, * and shall confirm the Sentence of the Judge, from whom it was Appealed, if the Proceedings are transmitted. For the Judge ought to Pronounce upon what he knows, and the Proceedings not being transmitted, he cannot have cognisance thereof: He must also remit the Cause back to the Judge from whom it was Appealed, and condemn the Party Appealing in Charges, and Tax those Charges in the same Sentence, and Decree. That the Party condemned, may be Admonished to pay those Charges against such a Day, to be appointed for that purpose, under Penalty of the Sentence of Excommunication under this form of words; 'We condemn the said N. the Party Appealing in Lawful Charges made in this Cause, and to be made payable by Law on the behalf of M. the Party Appellate, and we Tax the said Charges, to such a sum, (let the Proctor take care that Faith be made upon the Taxation of these Charges.)

* Lanfranc. ubi
supra. n. 90.
qualiter debet
iudex pronun-
ciare? Si velit
confirmare pri-
mam Sententi-
am, debet pro-
nunciare bene
iudicatum, &
male Apella-
tum, &c.

and we Decree, that the said N. should be admonisht to pay the said Charges before such a Day or Feast, to the said Party Appellate; and if in case he doth not obey this our Monition, within the said Term, we Excommunicate the said N. (this our Monition preceeding, and his Contempt following) in Writing, by this our Definitive Sentence, and do Decree him so to be Excommunicate, as well then as now, and now as then, &c.

5. Then the Proctor who obtaineth this Sentence, must procure a Motion for the Payment of these Charges, which Monition must also contain the Excommunication, or letter Denunciatory, which must be duly Executed, upon the Party so condemned in Charges, (that is, the Party must be admonished to pay the same, against a Day appointed, under Penalty of the Sentence of Excommunication Pronounced against him, in case he pay them not.) And if the said Party takes no care to pay the said Charges, within the Term or Day appointed, then the Letters of Excommunication, which are to be denounced, must be given to the Minister of the Parish Church, where the said Party Inhabits, who must denounce the same, and make a Certificate thereupon, as was spoken before concerning Excommunications: And if he perseveres in this State of Excommunication, forty Days and more, he is to be signified to the Kings's Majesty, and the Kings Writ is to be obtained, in order to the apprehending him, &c.

6. If the Party obtaining this Decree, in the cases aforesaid, takes not care (through his negligence or otherways) to Execute the same in due time, (to wit, upon some of the Days within the time assigned for payment) or perhaps after it is Executed, doth not take care to certifie of its Execution, so that the Certificate upon its Execution is discontinued, then the Proctor must acquaint the Judge and alledge that this Decree, already taken forth to such an effect, is perished without any success, and therefore he must desire that this Decree may be renewed, and that the Party may be Admonished again, to pay the aforesaid Charges, or else to appear, &c. which Petition the Judge Decrees.

7. Though the Party grieved by any nullity, may complain thereof, before a Superior Judge, because he is the Ordinary Judge for all Causes whatsoever, and hath knowledge in Causes, as well of Appeals, as Quereles: Yet may he if he will, go to the same Judge, by whom he is grieved, and alledge this nullity before him, and the Judge (the nullity being made appear to him) ought, and is wont to revoke the same, which if he doth not, then is just Cause given for an Appeal. For Example, if any Judge Pronounceth a void Sentence, (that is, where the Adverse Party is absent, or where the Witnesses produced in the Cause were not received, or in a Plenary Cause, when the Sute is not contested) the Party against whom this Sentence is Pronounced, (if he is called to shew Cause why the Sentence already laid, may not be put in Execution) he may alledge this nullity, specifying the same particularly: For a general Allegation, that the Sentence is null, is of no effect unless the Party so alledging, doth specify this nullity.

8. It is not Lawful either to Appeal, or to Complain by way of Appeal, from a Superior Judge to an Inferior; yet if in any Cause, depending before an Inferior Judge, any Sentence Pronounced, or any Act done, is objected before the Superior Judge, in order to hinder your intention or to confirm the intention of your Adversary, you may alledge and object this nullity: And if you prove it, the Inferior Judge (though principally he had not Cognisance of this nullity) yet he ought so to Pronounce, and adjudge in the Cause, like as if this void Sentence or Act, had not been Exhibited before him, and he may Pronounce so tacitly concerning this nullity.

C H A P.

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C H A P. II.

The manner of Proceeding in Causes of Appeal from a Sentence.

S E C T. I.

1. *Of an Appeal from an Interlocutory Decree, which hath the same force and power with a Definitive Sentence.*
2. *In what cases it is expedient to Appeal at the time of Pronouncing Sentence.*
3. *In what cases it is not convenient to Appeal at the time of Pronouncing Sentence, and how the Party (against whom it is Pronounced) must protest to Appeal, and accept the said Sentence in part, or so far as it makes on his part.*
4. *The manner and order of a Judicial Appeal, from a Definitive Sentence, which is called an Appeal at the Acts of Court.*
5. *The various forms of drawing an Appeal, either from a Definitive Sentence, or an Interlocutory Sentence, in respect of the Party that Appealeth.*
6. *The order of Prosecuting an Appeal, from a part of the Sentence only.*

From every Interlocutory Decree, † having the force of a Definitive Sentence it is Lawful to Appeal, either viva voce, at the Acts of the Court of the Judge who Pronounceth the same, or within fifteen Days after Writing before a Notary : But yet in Appeals from these Interlocutory Decrees, which have the force of a Definitive Sentence, Mr. Clarke saith that in his Practice, (and he saith, he has known other skilful Practitioners do)

† Regulariter a Sententia Interlocutoria non possit Appellari. hac vero regula limitatur a Lanfr. c. quoniam, de Appel. n. 68.

Quanam con-
stituunt diffe-
rentiam inter
Appellationes a
Sent. defin. &
Interlocutoria,
plene enume-
rantur a Lan-
franc. in loco
prædicto n. 69.
61. & inter-
easdem diff. no-
tum fecit quod
ab interl. debet
Appellari in
scriptis & sic
deinceps usq;
ad n. 77. Chi-
lianus in præf.
c. 105. & 106.
Wejemb. parat.
ff. de Appel. &
interloc. colum.
1724. lit. A.
Reinhard. diff.
jud. 35.

he rather chose to Appeal in Writing * than at the Acts of Court, because that in Writing he could so specify the Fact, and declare that Fact in which the grievance is inflicted, from the preceding Acts, and draw forth that grievance, from which it is Appealed, so to the life, that it may appear evidently that the Judge hath inflicted a grievance; which could not so easily be made appear, if it were Appealed at the Acts of Court from a grievance. Besides by this Appeal, thus interposed in Writing, a Libel may be drawn without much difficulty: For a Libel in an Appeal from grievances, ought to be conformable to the rescript, that is, the Inhibition, and the Inhibition again to the Appeal; because in the Inhibition or Rescript, is contained the true tenor, and effect of the Appeal. And although it is said above, that every Appeal ought to be interposed within fifteen Days, from the time of the Sentence Pronounced, or the grievance inflicted, yet this is to be understood, only where the Party hath notice, or knowledge of it, for otherways not; for the time of Appeal is current from the time of your knowledge or notice, &c. for if a Sentence is Pronounced, or an Interlocutory Decree, (which hath the force of a Sentence) which is null (*Scil.* being made in the absence of the other Party, not Admonished as above) is interposed, then is it Lawful to Appeal, or complain of its nullity, (either before the same Judge or before a Superior) within fifteen Days, after he has any notice of the same.

2. If the Sentence is pronounced in a Matrimonial Cause, against the Plaintiff, by which the Defendant is absolved from the Petition of the Plaintiff; it often falls out that the Defendant supposing by this Sentence, that it is Lawful for him to contract Matrimony with some other, doth often times so contract it; and get the same Solemnized. Likewise if two Clergy Men contend about a Benefice, and Sentence is Pronounced, that such an one of those two shall be Instituted and Inducted; in pursuance of which Sentence, the said Clergy Man doth get himself Inducted, or at least Instituted to the same within the time allowed the adverse Party for an Appeal; in like manner also if it be contested in the Prerogative Court, about a

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Will, and the Judge doth Pronounce Sentence for the Will: Or if it is contested about the granting of an Administration, and the Judge doth by his Sentence, commit the Administration to either of the Parties in Sute; the Executor or Administrator (under colour of these Sentences, and whilst the Delay or time given for an Appeal doth depend) is wont to intermeddle with the Goods of the Deceased, and to alienate the same, and sometimes to release Debts, and commence Actions at the Common Law, for the recovering Debts. In all these Cases, it is expedient for the Party, against whom the Sentence is pronounced to Appeal immediately at the Acts of Court, as in the fourth number next following. For if at the time of Pronouncing the Sentence of a Matrimonial Cause, you do Appeal; and the Party who obtained this Sentence, (notwithstanding this Appeal) doth Marry some other; the Parties Solemnizing this Marriage, are to be sequestred, or separated by the Judge of this Appeal, in the first place, and are also to be Canonically punished as Contemners of the Ecclesiastical Jurisdiction, as much as if the Marriage had been Solemnized against the Judge his command, and whilst the Sute were depending: Therefore in this case the Party Solemnizing this Marriage, cannot pretend himself ignorant of such a judicial Appeal, seeing it was interposed in the presence of his Proctor; which otherways he might have pretended, if the Appeal had been extrajudicial, or made out of Court. Likewise, if in a beneficial Cause the Clergy Man who obtained Sentence, (knowing that it is Appealed from the same, at the time of the Sentence) doth endeavour to get himself Instituted and Inducted; this Institution and Induction is reckoned among the things or matters attempted, and as such is to be revoked, first of all, by the Judge to whom it is Appealed. Likewise in Testamentary Causes, and those about Administrations, if it be judicially Appealed in the said Causes, both the Parties who possess the Deceased's Goods, and also those who owe the Deceased any thing, upon Bond, may keep the same in their hands, whilst this Appeal doth depend without any damage, though an Action be commenced against them for the same, by him who obtained the Sentence. Be-

cause that by this Appeal, all the force and effect of the said Sentence is suspended (until this Appeal be ended) as much as if no Sentence at all had been Pronounced.

3. If the Party against whom the Sentence is Pronounced, doth believe, that if he Appealeth at the Act of Court, the Judge (being offended at him Probably, because he hath Appealed from him) will assign him, two short and incompetent Terms, or times for the Prosecution, and Certifying the Appeal, thus interposed by him; so as that within that time he cannot Prosecute the same, nor give his Client an account of the Pronouncing this Sentence, nor be informed of his Resolution, whether he will acquiesce in this final Sentence, or Prosecute the Appeal already interposed. In this Case, it is not convenient that he do Appeal at the Acts of Court, at the time of Pronouncing this Sentence, but rather in Writing, before a Notary Publick, within ten or fifteen Days (at the most,) after the same is Pronounced: For in this Case the said fifteen Days (assigned for an Appeal, by the Statutes of this Realm) being elapsed, the Party Appealing is to be called, or rather, he is wont and may be called, (because the Party for whom the Sentence was given, is desirous to have the same put in Execution) to shew cause why the Sentence may not be put in Execution, before the Judge from whom it is Appealed, can assign the Party Appealing a time to Prosecute, and Certifie this his Appeal. Also if Sentence is Pronounced in a Cause of Tithes, and you Appeal from the same, at the time of Pronouncing thereof, the Judge may immediately (by vertue of the Statute,) put his Sentence in Execution, as to the Charges, and may Tax the same, notwithstanding the Appeal, and the Inhibition of the Superior Judge. If therefore you do Appeal from this Sentence, out of Court, in Writing before a Notary Publick, the aforesaid Sentence as to those Charges, is not to be put in Execution, unless (as is said above) the Party against whom the Sentence is Pronounced, be first called to shew Cause why the said Sentence may not be put in Execution; and unless the Party Appealing (if he appears) doth alledge that it is Appealed. The Party Appealing thus Extrajudicially, or out of Court, hath alledge

this advantage, (*Scil.*) he may give his Client a certain account, of the Pronouncing the Sentence, and of the Appeal which is interposed, and may receive full satisfaction from him, whether or no he shall Prosecute this Appeal, and whether or no he shall interpose another, if the Charges are Taxed, to over-great a sum. Yet if in the aforesaid Cases, you do not Appeal at the time of Pronouncing the Sentence; it is very requisite however, that you should dissent from the same at that instant (and protest as to the nullity of it, and of a Grievance, and of your intention of Appealing from the same, within the time limited by the Law for that purpose) lest otherways, you should seem to acquiesce in this Sentence, but if this Sentence doth make partly for, and partly against you, (*viz.*) because the Charges either are not Taxed in the same, or perhaps, because the Parry for whom the Sentence is Pronounced, is condemned in Charges, made on your part, as fall out sometimes in Matrimonial Causes; then is it more safe for you, to accept the said Sentence, so far as it makes on your part, especially in as much as it is condemnatory, or condemning the other Party, to pay Charges to your Client, &c. and you must acquaint the Judge also, that you do acquiesce in the said Sentence so far as it makes for the intention of your Client, but in all things else dissent, and protest (as before) of the nullity, &c. of a Grievance, and of Appealing, &c.

*Dissent. betw.
actual appeal
& a protest of
appeal.*

4. The Party against whom Sentence is Pronounced, may (at the very same time of Pronouncing it, and before the Judge doth proceed to other things) Appeal with the living Voice, * or by word of mouth, delivered and spoke at the Acts of Court before the said Judge who doth pronounce the Sentence, (who is called the Judge, from whom it is Appealed) And this Appeal he may interpose, in manner and form following. (*Viz.*) I do dissent from the Pronouncing of this Sentence, and do protest as to the nullity thereof, and of Appealing (from the same (*salva vestra reverentia Domine judex*) as Null, Invalid, Injust, and as such Pronounced) to Our Illustrious Prince and Sovereign, CHARLES, &c. and to his Court of Chancery. And here I do so Appeal to our said Sovereign Lord the King, in his Court

* *Lanfranc. c.
quoniam. de Ap-
pel. n. 49. quis
dicatur incon-
tinenti vel il-
lico Appellare.*

of

of Chancery; and I do desire that the Apostles may be given to me, and to my Client with effect, with all speed imaginable, (for unless the Apostles be asked, the Appeal availeth not.) And of this nullity, I do also equally and principally complain to, and require you, the Notary Publick (that is, the Register, or Writer of the Acts) to draw me a publick Instrument, upon the Appeal, thus by me interposed, and I desire the Witnesses here present, to give their Testimony upon the Premises, &c. The Writer of the Acts ought to insert the names of the Witnesses, (into his Act which is made upon the Pronouncing of every Sentence) which are present when the same is Pronounced.

5. Seeing (as was said above, of an Appeal from an Interlocutory Decree) it is Lawful to Appeal (either from a Definitive Sentence, or from any Interlocutory Decree, which hath the force of a Definitive Sentence,) at the Act of Court of the Judge, by word of Mouth, at the time of pronouncing the Sentence, so also (as was said before) is it Lawful to Appeal in Writing, within fifteen Days, before a Notary Publick and Witnesses. Therefore in these Appeals in Writing, from Definitive, or Interlocutory Sentences, if the Sentence is Pronounced against the Plaintiff, the Party Appealing is wont to declare in his Appeal, that such a Judge, in such a Cause, and betwixt such and such Persons, Pronounced a pretended Definitive Sentence, for the part of *N.* against the said *M.* by which among other things, he hath dismissed the aforesaid *N.* the Defendant, from the Instance and Petition of the said *M.* as to the things alledged, and related in the Libel given in on the part of the said *M.* and hath also Condemned him in Charges † made or pretended to be made on the part of the aforesaid *N.* the Defendant. But if the Sentence is Pronounced against the Defendant, then the Appeal is to be drawn on this manner; (*Scil.*) that such a Judge, &c. (as above) by which, amongst other things, he hath Condemned me, not only in a certain pretended Legacy, or in certain Tithes, but also, in certain pretended Charges, &c. and although the Parties Appealing (not only by the modern, but also by ancient Practice) are not wont to declare, or specify many Things, (in

† *Si iudex absolvit iustum ab expensis an sit gravam. Lanfr. c. quon. n. 10, 15. de expensis, & n. 14.*

the aforesaid cases) in their Appeals more than what are above recited; yet I think it very convenient (saith *Clarke*) for those Parties so Appealing, to add and specify these things or matters following. (*Viz.*) If the Plaintiff Appeal, then is it requisite that he say in his Appeal, that he hath sufficiently proved *the Libel, given in on this part, notwithstanding which, the Judge Pronounced the Abolatory Sentence as above. If the Defendant Appeal, then is it requisite that he add in his Appeal, that although the Plaintiff made default, in the Proof of his Libel; yet the Judge Pronounced a Sentence, Condemning him in a Legacy or in Tithes, as before. What things are to be inserted in Appeals, from an Interlocutory Decree, is spoke at the first number of this Chapter.

6. If it is Appealed in general, from the whole Sentence, the Party Appellate may adhere to the opposition of his Adversary, and may use the benefit thereof, (though he do not altogether Appeal from the same) to wit, because the Judge hath not Condemned the Party Appealing in Charges, or in the cases under writ. And if it doth appear before the Judge of the Appeal, that the Judge from whom it is Appealed, ought (by those Proofs made before him) to have Condemned the Party Appealing, in more Tithes or in a greater value for the Tithes, or in a greater sum for the Legacy Sued for; the Party Appellate (as to those things that is, as to greater Tithes, or a greater value, &c.) ought to obtain a Sentence for them, before the Judges, to whom it is Appealed. The like may be done also, if in the Appeal, the Party Appellate doth prove that there is a greater sum due to him, than that which is contained in the Sentence of the Judge, from whom he Appeals. But in those cases wherein it is Appealed, because the Judge doth Condemn the Plaintiff, who obtains the Sentence) in Charges, or doth not Condemn the Adverse Party in Charges, and the Party Appealing doth acquiesce, as to the rest, (*viz.*) as to the principal Cause: In this case unless the Party Appellate do so Appeal from the Definitive Sentence, and doth Prosecute the same; he cannot use the benefit of the aforesaid limited Appeal, nor adhere to the Appeal of his Adversary

* *Forma istac, non est ignota, in omnibus firmis Appellationibus in Curia Archiepiscopi. Eboracensis ita fecerunt mentionem in suis Protocolis, sicut etiam in Curia Episcopi Suffraganeorum, ubi est Appellatum in Scriptis.*

verfary, feeing he acquiesced in the Sentence, and it is sufficient for the Party Appealing in those Cases, to prove that the Sentence was Pronounced on his part, and against the Adverse Party. And from thence comes that general

† *Lanfranc. c. quoniam de expensis. n. 2.*

Conclusion, *Quod Victus Victori Condemnabitur in expensis.* For the better understanding Mr. Clarke's meaning in this I desire the Reader to look over Mr. Clarke's Practice, his Title *de Prosecutione Appellationis à parte Sententie tam in*

CHAP. III.

The manner of Appealing, and Prosecuting Appeals from Grievances.

SECT. I.

1. *What an Appeal (from Grievances) is.*
2. *The manner of proceeding in a Cause of Appeal from Grievances.*
3. *In what Cases it is requisite that the Party Appellate do confess the Grievances to avoid Charges.*
4. *In an Appeal from a Grievance, that is laid in a Cause of Correction, the Judge from whom it is Appealed may be cited to appear to answer in a Cause of Appeal though it be not Appealed particularly as to him.*
5. *The Party Appellate, in a Cause of Grievance may proceed in the principal Cause, whether the Appellant will or not, (the Grievance not being discussed, nor the Charges paid,) unless the Grievances are justified in the end of the Sute.*
6. *At whose Charge the Proceedings of the Inferior Judge must be transmitted, if the Grievances are confessed.*

* *Appellari potest a Gravamine illato.*

Lanf. c. quoniam de Appel. n. 60. vers. unde in casu non.

AN Appeal from a Grievance * is said to be, when an Inferior Judge, to wit, the Bishop of any Diocese within the Province of Canterbury; or his Official or

Vic

ical General, or Commissary in any part of his Diocese or
 Arch-deacon, or his Official do inflict any Grievance, †† *Ha vocantur*
 before the Sentence is Pronounced, (to wit) by reject- *interjudiciales*
 ing Witnesses, which ought by Law to be admitted, or by *Appellationes.*
 not admitting a Matter or Allegation, which is conclusive, *Wesem. parat.*
 the like : So also on the contrary, by admitting Witnes- *ff. de Appell. n. 4.*
 es and Matters which are not by Law to be admitted *Johan. Ananias*
 but in these Appeals from Grievances, the said Grievances *super. 50. decret.*
 from which it is so Appealed, ought to be exprest particu- *de heret. c. ver-*
 larly. *For it is not sufficient to say, that in such a Cause *gentis circa fi-*
 the Plaintiff or Defendant produced Witnesses, and the *nem.*
 Judge refused to admit them, or he gave a conclusive mat- ** Hoc certe in-*
 ter or Allegation, which the Judge rejected, but in this *nuitur ex eo*
 Appeal he ought to insert the Names of the Witnesses, *quod dicitur de*
 and the Things contained in the Matter rejected, and so *decreto interlo-*
 likewise he ought to do in all Appeals that are made from *cutorio, de quo*
 Grievances, or else the Appeal avails nothing. And ob- *vide notat. in*
 serve that all Appeals from Grievances, so as they be not *Marg. in Sect.*
 such as have the force of a Definitive Sentence, ought not *preceden. n. 1.*
 to be interposed *viva voce*, or by Word of Mouth, at the
 Acts of Court, but in Writing before the Judge himself, or
 if he cannot conveniently meet with him, then before a
 Notary †Publick, and Witnesses, and that within ten Days. † *Vide notata*
 or it may be doubted, whether or no the Statute, which *in Marg. in*
 limits fifteen Days for the time of interposing Appeals, *Sect. preced.*
 take place as to those Appeals which are interposed upon *n. 1.*
 Grievances, or only from Definitive Sentences, and those
 interlocutory Decrees which have the force of Definitive
 Sentences : Yet in these Cases, it is very often wont to be
 appealed after ten Days, and within fifteen. See the
 Statute 28 Henry the Eight Chap. 19.
 2. In these Appeals you must proceed in all Things, as
 in a Cause of Appeal, from a Definitive Sentence, as to
 the contestation of Sute; the conclusion in the Cause and
 the other judiciary and ordinary Acts : For a Cause of
 Grievance as to those things, doth follow the nature of the
 principal Cause ; (that is, if the original or principal Cause
 be Plenary or Summary, the Cause of Appeal is such
 so) except that in a Cause of Grievance, it is not Law-
 ful to alledge Things already alledged, nor to prove Things
 already

† Panorm.
 Consil. pars. 1.
 Consil. 2. Sect.
 Item etiam
 pramitto.

already proved, as in Causes of Appeal from Definitive Sentences: For the Grievances are to be justified by the Acts of Court, tof the Judge, from whom it is Appealed unless the Grievances were omitted out of the proceedings, or unless the Register would not insert into the Acts of Court, those things desired by the Party Appealing (*viz.* the admission of his matter, &c.) or unless it be Appealed from threatening words, uttered by the Judge in Court, or unless it do not appear by the Acts of the Judge that the Party Appellate, (that is, he at whose Petition, the Office of the Judge is pretended to be Promoted) hath Solicited the Judge to Proceed in that Cause of correction of his mere Office; although the Appellate, doth really promote the said Office. For in these cases of correction, the Parties Appealing, are often wont (out of favour and respect to the Judge) to cite and proceed against the Promoter of the Office of the Judge, and not against the Judge himself: But if by the Acts of the Judge from whom it is Appealed, it doth not appear, or is not manifest, that the Grievances imposed, (and from which it is Appealed) were imposed at the instance of another person: In this case the Proctor Appealing ought to take care that in the first Inhibition, he obtain a Citation against the Judge, from whom it is Appealed) to answer in a Cause of Appeal. The reason is, because the Party Appealing is oftentimes grieved with great Charges, in proving that there was another Promoter of the Office of the Judge. And if he doth not prove this directly, the Party Appellate is to be Absolved with Charges, though the Judge might probably proceed unjustly, and illegally in the Cause. Whereas it is otherways if you make the Judge, from whom you Appeal, a Party in this Appeal: For then if either any injustice or nullity do appear by the Proceedings transmitted, the Party Appealing will obtain Sentence against the Judge with Charges, as in the fourth number following. And it seems very Consentaneous to equity that the Judge should undergo the Penalties, and pay the Charges, if he doth proceed unjustly in the Cause, when his Office is voluntarily promoted: For admit any thing that was unjust were requested of the Judge, yet he ought

to Decree right, and if the Party Appealing do either by the Proceedings of the Judge, from whom it is Appealed, or by other Proofs, (in the aforesaid Cases,) prove his intention, he shall obtain Sentence with Charges : And the Party Appellate, if he were Plaintiff in the first Cause, he ought to Prosecute the same, before the said Judge, to whom it is Appealed : Which if he is unwilling to do, the Party Appealing may also obtain an Absolatory Sentence, in the principal Cause, with Charges.

3. If the Party Appellate doth believe that the Party Appealing hath Appealed justly, it is expedient (to abbreviate suits, and avoid Charges) that the said Appellate, (at the time of relating the Inhibition) do confess the Grievances specified in the Inhibition, or in the Libel (if it be given) and that he consent that it may be proceeded in the principal business, and also that he offer Charges which are made upon that account : For the Party Appealing is not obliged to proceed in the principal Cause, (if the Grievances are confessed) unless the Charges of this Grievance be first paid : Which being done, if the Party Appealing were Plaintiff in the first instance, he ought to be requested to proceed in the principal Cause, according to the form of the late Acts, had and made before the Judge, from whom it is Appealed ; and if the Party Appellate were Plaintiff in the first instance, he may proceed in the principal Cause, whether the Party Appealing will or not ; because the Party Appealing, by this his Appeal, hath consented to the jurisdiction of the Judge, to whom he Appealeth, and hath made him Judge of his Cause.

5. In every Appeal from Grievances, especially in a Cause of Correction, the Grievances are said to be imposed, as well of the mere office of the Judge, (from whom it is Appealed) as also at the instance of *M.* and *N.* yet the Parties Appealing in these cases, (out of respect to the Judge) are wont to desire a Citation to be Decreed, against the said *M.* and *N.* (and against the Judge,) to answer a Cause of Appeal : Yet if in the proceedings transmitted, it doth not appear that the Grievances, from which it is Appealed, were laid or imposed, at the instance of a Party, but of the mere Office of the Judge, the Party Appealing

pealing in this Case may desire the Judge to whom it is Appealed, (after Sute is contested with the Party Appellate) to Decree a Citation against the Judge, from whom it is Appealed, to answer in a Cause of Appeal : And if he appear, the said Party Appealing must give in a new Libel, and immediately Exhibit the Proceedings of the said Judge, (*viz.*) the said inferior Judge, and transmitted by him, in the said Cause, and betwixt the said Parties : And in presence of the said Inferior Judge, or his Proctor, the aforesaid Party Appealing must proceed to Sentence in the Cause. And if the Judge from whom it is Appealed, cannot justifie his Proceedings, the Party Appealing is to be Absolved, (as to those Matters, or Things laid against him) by the Absolatory *Sentence of the Judge, to whom he Appeals : And the said inferior Judge from whom he Appeals is to be Condemned in Charges of that second instance : But the Party Appellate is first to be dismissed with Charges : That is, he who was the Promoter of the Office of the inferior Judge, must it seems be dismissed with Charges, and the Judge must pay Charges. This Mr. Clarke saith, he hath known practised, (*viz.*) the aforesaid Judge to be called, in a Contradictory Court. But here it is to be noted, that although at the second number before going, it is said that in the Proceedings transmitted, the Grievances do not appear to have been imposed at the Petition of the Party Appellate, particularly named in the Appeal, and that the Party Appealing may desire that it may be proceeded against the Judge, from whom he Appeals, and that the said Judge may be called to answer in a Cause of Appeal ; yet is it Lawful for the said Party Appealing to prove by Witnesses, (that the Party Appellate did promote the Office of the said Inferior Judge from whom he Appeals, or that the said Judge did instigate him to proceed in the said business of correction notwithstanding that nothing is transmitted of the Proceedings had or made before the said Judge, from whom it is Appealed : And this being proved, the Party Appealing shall obtain Sentence against them both ; that is both against the first Party Appellate, and also against the Judge.

* *Ubi fertur
Sententia abso-
lutoria ab ob-
servatione ju-
dicii, debet
actor in expen-
sis condemnari.
Lanf. c. quo-
niam de expen-
s. 27.*

5. If in a Matrimonial Cause, the Defendant (knowing that the Plaintiff can fully prove by Witnesses, or by the confession of the said Defendant, the matrimonial contract alledged, out of an intention of protracting the Sute, and grieving the Plaintiff with infinite Charges, and also to prevent the pronouncing of a Definitive Sentence, for the Matrimony alledged) doth Appeal from certain pretended Grievances, whereas in very deed there were never any Grievances imposed. Likewise if the Defendant in a Cause of Legacy, at least where the Legacy is considerable, that so he may by frivolous Appeals protract the Sute, and keep the Legacy in his custody, whilst the Sute depends, and also pay the Charges of Sute, with the use of the Legacy) doth Appeal from pretended Grievances, when in very deed, there was not any Cause of Grievance, offered at all. In these Cases the Party Appellate, (so soon as the Inhibition is returned back, and Certified to the Judge of the Appeal) he may consent, that it may be proceeded by the Judge of this Appeal) in the principal Cause, according to the form of the late Acts, which were had and done before the Judge from whom it is Appealed. And seeing the Party Appealing, by such his Appeal, hath refused the Judge, (from whom he Appeals) as one whom he suspects, and not a competent Judge on his behalf, and hath consented to the Judge of the Appeal, as a fit Judge on his part; therefore he may be compelled (whether he will or not) to proceed in the principal Cause; and the Party Appellate is not obliged to pay the Charges of Grievance: Yet the Party Appealing, (if he thinks he hath appealed justly) may also proceed in the Cause of Grievance; and if it doth appear by the Proceedings, that the said Appellant had a just Cause of an Appeal, he shall obtain Sentence with Charges: And if on the contrary, he make default in the proof thereof, then he is to be compelled to pay the Party Appellate his Charges.

6. If before the Proceedings of the Judge (from whom it is Appealed) are transmitted, the Party Appellate doth confess the Grievances, and doth consent that it shall be proceeded in the principal Cause, and doth pay the Charges of the Grievance; the Party Appealing (if he were

Plaintiff

Plaintiff in the first instance, he ought to transmit the proceedings at his own costs; or otherways, the Judge to whom it is Appealed, cannot proceed in the principal Cause. Likewise if the Party Appellate were Plaintiff in the first instance, and desires that the Judge of the Appeal should proceed in the Principal Cause, he must take care to get the Proceedings transmitted at his Charge. The Defendant may also in the first instance, whether he were the Party Appealing, or the Party Appellate, if he knew that the Plaintiff did Institute an unjust Action in the first instance, and knowing that he hath been at a vast Charge in the Sute, already (that so he may recover the same again in the Appeal) he may cause the Proceeding to be transmitted, but at his own costs. Yet admit that the Party Appellate will not confess the Grievances, but having a mind to avoid Sute, and future Charges) doth consent to the Judge of the Appeal, and doth agree to proceed in the Principal Business; then if the Party Appealing doth believe that he can prove these Grievances, and if he will contest further about the same, he ought to transmit the Proceedings at his own Charges; which thing if he refuseth, then he ought to be condemned in those Charges, which the Party Appellate hath been at, by reason of such a pretended Appeal from Grievances. And on the contrary, if the Proceedings are transmitted, and it do appear by them, that such Grievances were imposed, the Party Appellate is to be Condemned in Charges. Therefore let the Party Appealing beware how he proceed any further in his Cause of Grievance, if he thinks he cannot justify the same; and to avoid Charges, let him also consent with the Party Appellate, to proceed in the Principal Cause omitting his Cause of Grievance.

S E C T. 2.

1. *The Judges of the Arch-bishop deferring to pronounce Sentence, it is Lawful to Appeal from them.*
2. *When the Party Appealing from the rejection of a concluding matter, &c. shall obtain his Appeal, and when not. Also the manner of offering immediate Proof.*
3. *The order and manner of Particularizing and Specifying this Appeal, from the rejection of this matter or Allegation.*
4. *The Party Appealing from Grievances which are imposed at the very same time, in which the Definitive Sentence is Pronounced shall have full Charges, and the Sentence (although justly pronounced perhaps as to the Justice of the Cause) shall be retracted as unjust, though it were not Appealed from it.*
5. *It is Lawful to Appeal from an unjust Excommunication, Pronounced upon a False and undue Certificate of a Citation.*
6. *Of an Appeal from an Immoderate and Excessive Taxation of Charges.*
7. *The manner of justifying an Appeal from the Taxation of Charges, &c.*

If it be concluded in the Cause, and the Advocates on both Parties have given the Judge informations, as well matters of Fact, as in the points of Law, so that they have nothing further to say in the Cause; and if there have been frequent assignations to hear Sentence, and the Judge hath refused, or at least hath deferred unjustly to Pronounce Sentence, either for the Plaintiff or the Defendant, it is lawful in these cases, for the Party Grieved to Appeal from these delays in not Administring Justice, to the King's Majesty in his Court of Chancery; and the Appeal valid, at least saith Mr. Clarke, I have had it adjudged in this Case, twenty Years ago. And although there are certain and determinate Judges Delegates, yet they are not a Commission to hear all Causes in general, but

only to hear and determine Causes of Appeal, which are interposed to the Kings Majesty, and to his Court of Chancery, by vertue of an Act of Parliament; and therefore none can have access to them by way of simple or double querele, &c.

2. If the Judge doth reject any conclusive matter which is pertinent to the Cause Instituted, (*viz.*) the payment of a Legacy and Tithes, or the exceptions against Witnesses (and such like things) either expressly or tacitly, by proceeding to other things contrary to this Petition; the Party who desired the same to be admitted, may Appeal for the not admission of it; and if in his Appeal he doth not prove the Truth of the things propounded, and of the matters rejected, he ought to lose his Cause of Appeal; because it is to be presumed on behalf of the Judge; that is, that the Judge knew that the premisses alledged were not True, and that the same were propounded with an intention to protract the Sute; but if in the aforesaid cases the Party propounding the premisses (that is, the matter or Allegation, which is conclusive in Law) doth aver before the Judge, that he doth not propound the same out of a malicious mind, nor with an intent unjustly to delay the Sute, and that he believes he can prove the same, and thereupon doth offer himself ready and prepared to prove the same immediately and forthwith; and yet the Judge doth refuse to admit the same expressly, or tacitly by proceeding to other things, contrary or prejudicial to the admission thereof, or at least doth unjustly defer to admit the same; the Party Appealing in this Case, shall prevail and obtain the Victory in his Cause of Appeal: Though in his Appeal, he doth not prove the Truth of the things contained in the Matters or Propositions, which were rejected. And this Mr. Clarke saith he hath had adjudged in a Court of Controversie six and twenty Years ago, and it is daily practised thus before the Kings Delegates.

3. Mr. Clarke hath thought fit to add this, which follows, as an enlargement or confirmation, of what is said at the first Number, and the first Sect. of this Chapter (*Scil.*) that in Appeals, from the rejection of an Allegation, or other Matters, (although conclusive) it is not sufficient

† De Hisce gravaminibus plura & plenius reperias apud Lanfr. cap. quoniam, de Appel. a numb. 62. ad numerum 68. & præsertim in n. 66. ad rem loquitur.

sufficient, (if you intend to prevail in your Appeal) that you insert the things contained in the Matter or Allegation which is rejected in your Appeal, but that you do also prove these Contents; for otherways, you shall lose your Cause; because it is to be presumed for the Judge, from whom it is Appealed, that either this rejected matter was propounded with an Intention to protract the Sute, or that the Party could not prove the same: Add also that if in the matter rejected, there were contained any Articles or Positions, which by Law are not to be admitted, because they are impertinent to the Cause, or were formerly propounded, or are contrary to those which have been already propounded, (upon which Witnesses have been Produced, Sworn, Examined, and their Depositions published, and made known to the Parties:) And admit, that in this Appeal you prove the Truth of all these Articles, yet the Judge of this Appeal ought not to admit these Articles, but only the rest of the Articles which are pertinent, and ought to be admitted by Law; and the Party Appealing in this case is to be condemned in Charges, at least he shall not obtain Charges, and if he do obtain any, yet they shall be very mean and small. The reason is because that in so dubious a matter, it shall rather be presumed for the Judge, and it may be urged on behalf of the said Judge, from whom it is Appealed, that he hath rejected this Allegation of Matter, in as much as it contains diverse Causes, or diverse Articles, which by Law ought not to be admitted; that the Judge, (though he have rejected this Matter,) hath only rejected those Articles, which are not to be admitted by Law: But *quære*, because the Party Appellate, refusing the whole Matter to be rejected, and not consenting (either before the Judge from, or to whom it is Appealed) that these Positions should be admitted, which by Law ought to be admitted; he is therefore an Occasion of Delay, and hath given Occasion for an Appeal, upon the rejection of the Matters aforesaid. Let the Proctors therefore take heed, that in these Appeals, from the rejection of any Matter, (if they are doubtful of any Article, whether it ought to be admitted or not) they rather chuse to admit, than insert the same in the Appeal;

and so by omitting those Articles which are not to be admitted, they take away all controversie, touching the Charges which are to be allowed, or are not to be allowed, or which are to be moderated.

4. If at the same time, in which the Sentence is pronounced, the Judge (before the pronouncing thereof) doth Grieve the Party against whom the Sentence is pronounced, by rejecting the Witnesses, or any Matter of Defence which ought by Law to be admitted, the Party Appealing in this case, if he justifieth his Cause of Appeal from those Grievances, shall obtain Sentence, with his whole Charges; and the Definitive Sentence, though otherwise just, as to the merits of the Cause, yet (seeing it was pronounced within the time allowed for an Appeal from those Grievances, imposed at the same instant) it shall be revoked as an attempt, or a thing done by way of attempt, although it be not Appealed from the said Sentence; yet the Party Appellate in this case may ask and procure Sentence to be pronounced (on a new score, as to the principal Cause) before the Judge of the Appeal, and may obtain his Charges made in the first instance in all things, like as if it had been obtained in the first instance before the Judge from whom it is Appealed, and as though it had not been Appealed at all. This Mr. Clarke saith he has known adjudged, but *quare quid sit juris*.

* *Lanf. c. quoniam de Appel.*
n. 62.

5. Although every Excommunicate Person, who is Excommunicate upon a fictitious, and false Certificate, *may (and (by daily Practice) is wont to object against this Certificate, and to desire an Absolution, from this unjust Excommunication, yet may the Excommunicate Person in this case Appeal from the said Sentence of Excommunication, to the Superior Judge, and object before him, against the Certificate of the Citation, upon which he was Excommunicate; and if he proves these Objections, he shall obtain his Appeal, and the adverse Party who obtained this Excommunication, is to be condemned in Charges of the whole Appeal, and of the unjust Excommunication, and the Principal Cause is to be tried before the Judge of the Appeal; if therefore this Cause of Appeal is given, and the Excommunicate Person doth suspect the

Judge

Judge, it is most safe for him to use this Appeal. And observe, that this Appeal ought to be interposed not only from the said Sentence of Appeal only, but also if in case there were a Citation Decreed, *viis & modis*, by reason of a false Certificate, (*viz.* that the Party was sought at his House, &c.) the Appeal ought to be interposed as to the Decree of that Citation also. For to Decree a Party to be cited *viis & modis*, upon a Certificate that he was sought in a place where he never inhabited, and to Decree a Citation, no primary or personal Citation preceeding, is all one and the same thing. And for certain to Decree any one (unless he be a fugitive, and such as hath no habitation,) to be cited by publick edict, *viis & modis*, no primary Citation preceeding, it is a very just Grievance. Of this see more, where it is spoke of the manner of objecting against an unjust Excommunication, in the second part of this Book.

6. If excessive Charges are taxed, *that is, if the Judge **Lanfr. c. quoniam de Appel. n. 66.* doth exceed in the Taxation, it is convenient for the Party Appealing to declare particularly in his Appeal, to deduct these excesses, and to distinguish first those Charges, which are to be allowed by Law, and by the Style of the Court, and also those which are expended by the Party : And then because in the Schedule of Charges, which is offered by the Party, and is Taxed by the Judge, there are contained both the just and also the extraordinary Charges ; in this Appeal therefore mention is to be made of the whole Schedule of Charges ; and seeing that if both these Schedules, (*viz.* the said first Schedule, which contains only the just and due Charges, and also that whole Schedule given by the Party, and Taxed by the Judge, which contains as well those which are due, as those which are extraordinary) were inserted in the Appeal, and the Inhibition, (for the Inhibition ought to contain the tenor of the whole Appeal) the same would be too long and tedious : And therefore these Schedules are to be annexed to the Appeal, and these words are to be inserted, (*Scil.*) 'As is contained in the Schedules annexed to these presents, which if the Proctor aforesaid will, and do desire may be accounted as read, and inserted in this Appeal, &c. In which

second Schedule thus annexed, the extraordinary Charges are to be described, and set down. And the said extraordinary Charges so contained in that Schedule, ought to be particularly inserted, either in the Appeal, or else by referring to a third Schedule, annexed thereto also. It is likewise necessary, to conclude in that Appeal, that if these extraordinary Charges, (which is to be understood of those Charges, mentioned in the third Schedule) which are not allowable, or if many or some of them had not been allowed and Taxed by the Judge, in his general Taxation, the sum so Taxed could not have extended to above such a sum: And in this the Party Appealing is wont to refer himself to these respective Schedules or Charges, and to the Taxation made by the Judge; for at the bottom of the Schedule which is offered, the Judge is wont to Tax the Charges to such a certain sum.

7. Now Mr. Clarke says, he cannot remember, that the Parties Appealing in these cases, ever got their Appeal; the reason whereof, he supposeth was partly because the Appeals were not concluding, nor particularly describing the extraordinary Charges; and partly (though the Judge might exceed a due measure in the Taxation) yet because the Party Appealing made default in the proof of this excess: That therefore the Parties Appealing (from such immoderate Taxation,) may obtain their Appeal, they must prove the excess or immoderate Taxation, on this manner: If in the Schedule of Charges, there are extraordinary Charges asked for the dispatch of a Commission, in remote parts, (as is very usual) the Notary who was taken and made choice of, for the dispatch of this Commission, is to be produced as a Witness; if any extraordinary sum is pretended to be given to the Commissioners, for their pains about the dispatch of this Commission: If an extraordinary sum is desired to be allowed, under colour of journey Charges for the Witnesses; or any other Charges about the Witnesses or Commissioners, to wit for their meat, &c. the said Commissioners and Witnesses are to be produced, as also those Persons, in whose Houses the Commissioners sate, and where the Witnesses were produced and had their meat: Which persons without doubt,

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can depose the respective sums they received, and which were duly disbursed in and about the same. If also in the said Schedule of Charges, a greater sum is asked for the Examination of the Witnesses, for the Copies of their Depositions, and for the Proctors Fees, than is due by the Stile of that Court, (in which the Cause is tried,) this Custom of the Court, and the real sum, which is due by that Stile or Custom, ought to be alledged and proved by the Party Appealing; because these Charges cannot be proved, but by inspection of the proceedings of the Judge, from whom it is Appealed. But if in the aforesaid Bill of Charges, the Party who obtains this Taxation, doth desire any Fees, for the Examination and Copies of more Witnesses than were examined, or doth desire Fees for Proctors, Advocates, or Solicitors for any Term, before the Cause was begun, or for those Terms in which nothing at all was done in the Cause, (it being perhaps put to Arbitration, for two or three Terms together) these excesses may be justified by the Acts themselves: And if (when these extraordinary and inallowable Charges are deducted) it doth appear, that (if these extraordinary Charges, or some of them, had not been allowed by the Judge, from whom it is Appealed in his said general Taxation,) the remaining sum or Charges, specified in the said Schedule, should not have extended to the sum Taxed, the Party Appealing in this case, shall obtain his Appeal. But it is to be noted, that although the Judge of the Appeal do reverse the Decree (as to the Taxation of Charges) interposed by the Inferiour Judge, and do condemn the Party Appellate, in the Charges of the whole Appeal; yet if it be required of him, the said Judge to whom it is Appealed, shall Tax and allow the Party Appellate his Lawful and just Charges; and shall compel the Party Appealing to pay the same, if it be Appealed only from the extraordinary Taxation. For if it were Appealed, as well from the Definitive Sentence, as also from the Taxation of Charges and the Judge of the Appeal, proceeding in both Causes, doth pronounce his Sentence against the Party Appellate, whereby he retracts the Sentence of the Inferiour Judge, as to the principal Cause; the Appellate

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in this case, in the said Cause of Appeal, from a Taxation of Charges, shall not obtain a new Taxation of Charges, for the Party Appealing is to be freed from all Charges, and shall obtain his Charges of the first Instance. See further what is said of compounding the Charges, at the first Chapter and the second number of this part.



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THE PRACTICE OF THE Ecclesiastical Courts.

THE SIXTH PART.

CHAP. I.

SECT. I.

Of Matrimonial Contracts.

1. *Causes touching Matrimony are wont to be tried in these Courts. Also in what form instituted, and how manifold these Causes are.*
2. *The manner of getting a Citation with an Inhibition in Causes of Contract.*
3. *The manner of proceeding in a Cause of Facilitation or Boasting of Matrimony, and the tenor of the Sentence to be pronounced in the Cause.*
4. *The form of alledging and justifying this Facilitation of Marriage, before the Sute is contested. And of the tenor of the Sentence, if the Defendant doth justifie this Facilitation or Boasting.*

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5. The Defendant may give and propound, a justifiable matter (in this Cause of Facilitation of Marriage, in order to justify what he hath so boasted of) after Sute is contested. Also the tenor of the Sentence in this case.
6. The Defendant being cited in a Cause of Facilitation or Boasting of Marriage, may Institute an Action against the Plaintiff, (in a Matrimonial Cause about a Contract) either in the same Court, where himself is so cited, or before any other competent Judge.
7. The manner of Beginning, Prosecuting, and Ending a Cause of Contract, if the Defendant either cannot be cited, or if being cited by publick Edict, he do not appear either by himself, or his Proctor.
8. The manner of producing Witnesses in a Cause of Contract, after the Attests are published; and the special privilege of this Cause.
9. The manner of Sequestering or Separating the Woman (who is Sued in this Cause) from the custody of her Parents, whilst the Sute depends.
10. Of a general intimation and Inhibition in a Cause of contract.
11. The manner of punishing those persons, who contract or solemnize a clandestine Marriage, whilst the Sute depends, or against the Inhibition of the Judge.
12. The Matrimony which is contracted, or solemnized whilst a Sute depends, enjoys not the like privileges, as a Marriage which is really and Lawfully solemnized.
13. The manner of proceeding, if the Party who is Sued (being Excommunicate and Imprisoned) doth agree to solemnize the Marriage.
14. In what cases the Judge may condemn the Party obtaining the Sentence in Charges, or absolve the Party (against whom the Sentence is pronounced) from Charges.
15. The manner of putting Sentence in Execution in these Causes of Contracts.
16. The manner of proceeding against the Defendant refusing to solemnize the Marriage according to the tenor of the Sentence.

17. Another manner of proceeding if the Defendant doth yet refuse to solemnize the Marriage, notwithstanding.
 18. A third person may come in for his interest in this Cause of Contract, and certain other Causes.

IF any doth contract Marriage, but doth not solemnize it in the Face of the Church; and if the Woman doth deny this contract; the Man may Institute an Action in a Cause of contract; and if the Plaintiff fear that the Woman (whilst the Sute depends) doth intend to contract another Marriage, he may take care to insert in the said Citation, an Inhibition against the Party to be cited, to forbid her to contract Marriage with any other, whilst the Sute depends, or that she procure any former contract to be solemnized. 2. If a Marriage is solemnized in the Church, and the Woman doth go from her Husband, * or if on the contrary a Husband hath cast off his Wife, then an Action is to be Instituted in a Cause of Restitution of the conjugal Yoak. If any doth solemnize Matrimony with one Woman, and doth afterwards procure a second Marriage to be solemnized: If she who is the Lawful Wife doth desire to be restored to her Husband, an Action is to be Instituted in a Cause of Divorce, from the Bond of Matrimony, and of Restitution of the conjugal Yoak. But the Action is to be commenced, as well against the Party taking the second Wife, as also against the said second Wife so taken: Or otherways, a Sentence of Divorce being pronounced against the Man, (the said Woman taken in the second Marriage, not being also called) the Sentence avails not as to her, nor shall this Sute prejudice her, which otherways it might do if she were called, and the aforesaid Sute were Instituted against them both. And this which is said as to the Woman, has the like effect, as to the Man. 3. Likewise if a Woman who is Married to a Man, who hath a former Wife in being, doth desire to be released from that Man (she having also a former Husband in being.) And desiring that the performance of the said Matrimonial contract, betwixt her and the said Man, may be pronounced as null and invalid; in this case,

* *Maritus tanquam Excommunicatus potest agere in hac Causa. cap. Tholos. quest. 172.*

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she must Institute her Action, as is usual in a Cause of Divorce, from the Bond of Matrimony; and for those reasons even now mentioned, it is expedient that that Action be Instituted against the Lawful Wife of the said Man. The like also must be observed against the Woman. 4. If a

† *Wesemb. parat. ff. de ritu nupt. n. 4. 8. Litt. C. col. 951. Myns. Inst. de nuptiis in text. justas autem. n. 4. Contraria. Matrimonio. sunt quam plurima, quae vel impediunt illud contrahi vel contractum dissolvunt ha pleniús traduntur a Wesemb. ubi. supra per totum. num. 8.* Virgin who is within twelve years of age, † but above seven doth actually solemnize a Marriage with a Minor, who is under fourteen years of age; so soon as she comes to a Lawful age, that is, to twelve years of age, she may come before a Notary publick (if a Notary can be had) and before Witnesses, and may dissent from this Marriage, and protest that she doth not in the least intend to ratifie the said Marriage in any respect, or consent to it; but on the contrary to recede from it, and forsake it: In this case she may Lawfully solemnize a second Marriage, with any other; for by this dissenting the first Marriage is rendered null: What is here said of a Girl under twelve years of age, may also be understood to take place in a Man who is Married under fourteen years of age. Yet in these cases before Persons contract and solemnize a second Marriage, they are wont to commence an Action against the Person, (with whom they did actually Marry in their Minority) when they come to Lawful age, in a Cause of Nullity of Matrimony, and they may obtain the Sentence of the Judge for the Nullity thereof. Yet altho' the Persons in this case are wont (before their second Marriage,) to Institute an Action for the Nullity of the first Marriage, and to obtain Sentence accordingly, yet if before the Institution of this Cause, the said Woman doth solemnize another Marriage (no Sentence preceding) this second Marriage is valid, and is accounted Lawful, so as (after the said Party hath attained the Lawful age) no manner of consent went before, either in Words or Acts, which might tend to a confirmation of the first Marriage. But admitting that the Woman doth come to full age, whilst the Man is yet in his minority, that is, under fourteen years of age, (for in this case, there is required an express dissent as above, or an Institution of the Action for the Nullity of the Marriage, seeing there is required the * mutual consent of both the Parties, ere the aforesaid Marriage be perfect; which

* *Schurffius consil. 83. n. 11. cent. 3. Baldus in rept. 1. n. 4. C. de eman. lib. Socinus consil. 39. n. 3. & 5. vol. 1. Myns. Inst. de nup. in text. justas autem. n. 7.*

which cannot be had, if either of the Parties be a Minor;) therefore the Woman (as was said above) may very lawfully contract, and solemnize a second Marriage: yet the premisses are to be understood of a young Man, who solemnizeth a Marriage, within fourteen years of age, and doth not dissent from this Marriage so soon as he comes to a Lawful age; the young Woman being then also a Minor. If in this case even now specified, the aforesaid Parties, who do actually solemnize this Marriage in their minority, so soon as they come to their full age, (that is, the Woman to twelve, and the Man to fourteen) do ratify the said first Marriage, by words, calling each other Husband and Wife, or by Deeds or Letters, Messages, Gifts, or other signs of familiarity, hereby approving the said Marriage, (though so solemnized within the aforesaid years) but more particularly ratifying it by carnal knowledge of each other, lying together in one and the same bed; and yet notwithstanding all this, they endeavour to solemnize a second Marriage, with some else; either of the Parties in this case, may Sue the other, (who endeavours a second Marriage) in a Matrimonial Cause, and a Cause of Divorce; and if the Plaintiff in this Cause prove the first Marriage ratified, by a consent, (as aforesaid) either by Words or Letters, &c. before the second Marriage, and after the Lawful age; he or she thus suing shall obtain a Sentence of Divorce, revoking the second Marriage, and confirming the first Marriage. 5. If they do contract, and solemnize a Marriage within the degrees of consanguinity * or affinity being prohibited by * *Wesemb. ubi supra. col. 963* Divine Law, or not permitted by the Laws of the *Litt. B. Inst. de nuptiis Sect. ergo.* Realm; this Copulation is not Matrimony, but Adultery, rather Incest: And an Action of Divorce, from the Bond of Matrimony, may be commenced by both Parties; or either (seeing the Marriage was void in the beginning) an Action may be commenced in a Cause of nullity of the Marriage. 6. If a young Man doth treat with a Woman, in order to contract a Marriage with her, or perhaps hath contracted a future Marriage, but not a Marriage to be celebrated immediately, but only after some time, or under some conditions, whose event must first be expected: If

If the said Woman doth boast and affirm, that the said young Man hath contracted a Marriage with her, which is to take place immediatley, and so consequently doth call him her Husband, and her self his Wife (which often falls out to the great prejudice of the young Man, who purposeth to contract another Marriage) this young Man may have an Action against this Woman, in a cause of Jactitation of Marriage. 7. The like Cause also, the Woman may Institute against the Man, in the like case: And because Marriage is not only ordained to avoid Fornication, but also for Procreation; if therefore a Marriage is actually solemnized betwixt a Man and a Woman, who are altogether incapable (not by reason of age, but by reason of some natural Impediment) to Procreate Children, to wit, by reason of Impotency, coldness and the like, these render the Marriage null. Those natural impediments sometimes happen, both to the Woman and the Man. 8. If a Husband is Cruel and Brutish to his Wife, threatening her Death, or using her Barbarously in Words or Actions, giving her Poison to Drink, or committing some such like act, as the Woman is in danger of her Life, by living with her Husband, or at least is not able to undergo the conjugal Yoak; the Woman in this case may commence Sute against her Husband in a cause of Divorce, or rather in a Cause of separation from Bed and Board, by reason of cruelty. The like Cause also may be Instituted by the Man against his Wife. 9. If a Woman desires to be Separated or Divorced from her Husband, (or on the contrary a Man from his Wife) by reason of Adultery, they may also commence the like action, in a Cause of Divorce or Separation from Bed and Board. 10. If the Parents, Friends of a Man or a Woman, who were present at the time of solemnizing, or contracting a Marriage betwixt their Children or Kindred, &c. or any other Persons, if a Definitive Sentence is Pronounced for a Marriage (the Parents or Friends knowing of and being present at such a Sentence) from which Sentence, no Appeal is interposed, or if an Appeal be interposed, yet the same is not prosecuted, but deferred: Notwithstanding which the said Parents or Friends, of the said Woman, do so

and detain her, against her Will, that she cannot be cited to answer in a Matrimonial Cause, or she cannot be had or come to, so as the Marriage may be solemnized, according to the Sentence; or if they do by words or threatnings endeavour to perswade the Girl to deny the Marriage, although contracted in their presence, or adjudged by Sentence as above, and do endeavour to Alienate her Love and Affection, from this Man, and sometimes do solicit her to Marry some else: In this case, he who contracted this Marriage with the said Girl, may Sue the said Parents, or Friends in a Cause of hindrance of Marriage; and the Premises being proved, they are to be Corrected and Punished, according to Law, and at the Judge his pleasure, and are to be condemned in Charges. The like may be understood of a young Man, if the Woman is Plaintiff.

2. If a Plaintiff in a Matrimonial Cause, doth believe without doubt, that the Defendant who is to be cited, will (whilst the Sute doth depend,) contract or solemnize Marriage with some other: Let them take care to insert an Inhibition in the Citation, against the Party to be cited to inhibit and forbid them to contract any other Marriage, with any other Person, whilst the Sute doth depend; and that (if they have actually contracted any such Marriage, before the said citation is Executed,) they proceed not to solemnize the same, in the Face of the Church, under penalty of contempt of the Law. And if the Plaintiff doth know or suspect any Person who is likely to solemnize Marriage with the Defendant, they obtain a general Inhibition in the said citation, (*viz.*) against the Defendant and the Person whom they suspect in special, and all others in general, forbidding them to do, or attempt to do any thing in prejudice of the Sute, (whilst it depends) under penalty, &c.

A Cause of jactitation of Marriage, is a Plenary Cause, and requires the like proceedings, as a Cause of detraction; this only excepted, that in a Cause of jactitation of Marriage, the Defendant is to be compelled to answer to the positions of the Libel, though no Witnesses are produced upon the same, which cannot be done in a Cause

**Hic intenditur de sponsalibus. Sponsalia que sunt, unde dicta & quorundam olim & nunc facta Myns. Inst. de nup. Sect. 1. ux. n. 3, 4. Gail. 2. obs. 80. n. 5. Wesemb. ff. de ritu nup. n. 2. Alciat. ff. de verb. sig. l. pronuntiat. 46. Sect. materfam. n. 8. Angelus & Fab in Sect. alien. in princip. Inst. de donat. on. in l. tale. 40. Adio ex sponsa vel ex sponso, item Matrimonialis, est nihil aliud quam jus persequendi quod sponso, sponsa vel parentibus eorum contra sponsum sponsamve matrimonii consummationem recusantem, &c. ut reus condemnatur ad Matrimonii consummationem, &c. Dñ. Hahn. ad Wesemb. parat. de sponsal. n. 6.*

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semb. parat. ff.
de sponsal. n. 3.
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prud. Eccl. 2.
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Thomas San-
chez. de Ma-
trimon. l. 7.
d. 82.*

of defamation. If therefore the Plaintiff do prove, either by the Defendant's Confession, or by Witnesses, that the Defendant said or boasted, that he had contracted Marriage with the Defendant, or that the Plaintiff was his Wife, and if the Defendant doth not alledge and prove that he said, and boasted this upon some just grounds (Scil. if he cannot prove that an immediate Marriage* was contracted betwixt them, as he hath given out) in this case, Sentence is to be pronounced for the Plaintiff to this purpose, (*viz.*) that the Defendant hath rashly and unjustly boasted such a contract, and perpetual silence is to be imposed to the said Defendant, in that behalf, and he is also to be condemned in Charges.

4. But if the Defendant being called, doth intend to justify the justification of Marriage mentioned in the Libel (that is, that he hath justly and truly said and boasted such a contract) he may propound a justificatory, or a defensive matter or Allegation, (on the day assigned him or his Proctor to answer to the Libel of the Plaintiff) before Sute is contested, or instead of the form of contesting Sute. And that may be done thus. 'IN. (that is the Defendant or his Proctor) in answer to the Libel, already given in this Cause, do here give in a matter or Allegation, instead of an answer; and I do Answer, Alledge, Protest, and do all other things, as is contained in this Allegation. And under Protestation of the Nullity, the Ineptitude, Generality, &c. of the said Libel of my Adversary, I contest Sute negatively to the same. Seeing the justification of this boasting of Marriage is propounded and alledged at the time of contesting Sute, if the Defendant prove, that his boasting was upon just grounds, (that he did really contract an absolute Marriage with the Plaintiff) the Judge may pronounce in one and the same Sentence, not only that the Plaintiff hath made default in the proof of his Libel, (at least in as much as he desired) that the Defendant may be pronounced to have defamed and unjustly boasted such a contract with the Plaintiff, and also that silence may be imposed to the Defendant, and also Sentence may be pronounced at the same time, that the Marriage alledged like as if a Matrimonial Cause

been originally Instituted : But if the Defendant doth make default, in the proof of what he undertakes to justifie ; then on the contrary, Sentence is to be Pronounced that the Plaintiff hath proved his Libel, and that the Defendant hath failed to justifie and prove the contract by him alledged and pretended, and that therefore perpetual silence is to be imposed upon the Defendant, as to the matters by him desired and alledged, and that the Plaintiff shall be dismissed from the Instance and Petition of the Defendant, and the said Defendant to be condemned in Charges, of the whole Sute.

5. And although (as is now said) this matter in order to justifie the contract so Boasted of, may be propounded upon the day assigned to answer the Libel, and instead of contestation of Sute, yet the Defendant may also propound this matter after the Sute is contested, in order to frustrate the intention of the Plaintiff; yet so as the same be propounded before the depositions of the Plaintiffs Witnesses, (produced upon a Libel) be published. For after the attests are published, and that the Defendant is informed of the contents of them, it is forbid to give in any matter which is directly contrary. But *quære*, whether or no (notwithstanding such publication, and information of the depositions,) any matter, though contrary, may not be propounded in a Matrimonial Cause; if the Defendant in this case doth justifie what he Boasted, that is, if he doth fully prove a Matrimonial contract betwixt him and the Plaintiff) he shall only obtain an absolutory Sentence, (viz.) that the Plaintiff hath made default in the proof of his Libel, and that the Defendant is to be dismissed, and dissolved from the instance of the Plaintiff. Yet formerly the Advocates were of opinion (and so it hath usually been practised) that in this case now mentioned, (*viz.*) that if the Defendant do prove the Matrimonial contract, though alledged by him after Sute was contested, yet he should obtain Sentence as above. And (though we said before, that the said matter ought to be propounded before the Publication of the Witnesses, lest it should be denied admittance after) yet if in the Libel no certain day or time (in which the Words of Boasting are pretended to

be spoke) are inserted but only in general, upon or about such Months (naming several Months) and in such or such a place, as is usual in these cases; here though the Defendant's matter be directly contrary to the Plaintiff's Libel, yet it may be propounded: Because the Defendant by reason of that general Allegation cannot defend himself, which otherways he might easily do, after the Attests are published. For then if the Witnesses do depose, as to the time and place, in which the Defendant uttered the words mentioned in the Libel, he may prove a negative, (*viz.*) that he was absent at that time, and from that place they Swear to; and that he was at that instant (they speak of) present in another place: As also he may prove by other Witnesses (who gave diligent attention) which and what words, were spoke by the Defendant: He may also produce a greater number of Witnesses (who were present at the time and place deposed by the Plaintiff's Witnesses) who may perhaps Swear that the Defendant never spoke such words. The Defendant may also prove, that he contracted Marriage with the Plaintiff, before the time of speaking the words mentioned in the Libel, and therefore that he hath justly Boasted, &c.

6. Some of our late Advocates are of Opinion (and so Mr. Clarke says he has known it adjudged) that the Party who is cited to answer in a Cause of Jactitation of Marriage, may either in the same Court, or before any other competent Judge (notwithstanding a citation is first Executed upon him in a Cause of Jactitation of Marriage) institute a Matrimonial Cause against the said Plaintiff. Though in former times the Advocates were of a contrary opinion, (*viz.*) that the Defendant could not institute a Matrimonial Cause either before the same Judge, or any other competent Judge whatever; but that he is bound to alledge the Marriage (if he hath contracted any with the Plaintiff) before the same Judge, and in the same Cause, which is so Instituted against him for Boasting the Marriage &c. and not in any other new Cause. The Reasons they give for this opinion, are, that if two several Causes are Instituted, the one for Boasting a Marriage, and the other for a Matrimonial contract; it might easily fall out, that

PART VI.
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Parents, and Kindred of the Party so to be cited : And if the said Party doth so abscond, as that he cannot be cited, the Mandatory must make a Certificate upon this Mandate according to the usual form : And thereupon a citation *viis & modis*, is to be asked and decreed, which must also be Executed and Certified, after the usual manner. But if the Party so cited do not appear, he is to be decreed, and publicly denounced Excommunicate in that Parish Church, where he last resided, and also in the Parish Church where his Parents reside. Which being thus done ; about a Week or more after such denunciation the Plaintiff or his Proctor may appear and alledge that he hath used all possible diligence in order to cite the Adverse Party, to answer him in a Matrimonial Cause, and that the said Party doth so abscond, as that he cannot be personally cited, and that therefore he hath taken care to get him cited by publick Edict, which publick Edict is also Executed, Certified, and the said Party Pronounced, Decreed, and Denounced Excommunicate upon the same, publickly in the Parish Church, where his last abode was, as may appear by the said Letters of Excommunication, so denounced, (which Letters the Plaintiff must then exhibit) and that notwithstanding the premisses the said Defendant doth fly from Judgment, and doth contumaciously absent himself from the same, and that the Parents, Kindred and Neighbours of the said Party do commonly report, that he hath transported himself beyond Seas, so as this your Mandate may not be Executed upon him, or any Sute be prosecuted against him ; and further the said Plaintiff must also alledge, that the Witnesses which he hath to prove this contract, are old and infirm (if it be so) or that it is very doubtful as to their lives, or however, lest in process of time, they should forget the formal words of the contract, or other circumstances touching the same, as also the giving and receiving of Gold, and of the Ring as signs of this contract, and likewise the confession and acknowledgment made (of this contract) by the Party himself, (which things are apt to slide out of the memory) and so their Testimony may be in danger of perishing, to the great damage of the said Plaintiff ; wherefore he must desire that the said Defendant may

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be called to appear within Threescore, Fifty, Forty, or Thirty Days at least, after Execution of this Citation, (if the Party to be cited, be without the Kingdom) if it be a Court Day, &c. (as in other ordinary Citations) by publick Ediēt, affixed as well upon the doors of the Parish Church, where the Defendant last resided, as also upon the Royal Exchange, at the time of the Merchants meeting together. By which publick Ediēt the said Party must be cited to these following effects, *Scil.*

To answer *M.* in a Matrimonial Cause.

To see a Libel given.

To see a Term assigned to prove the said Libel.

To see Witnesses, Produced, Admitted, Swore and Examined upon the same.

To see the Sayings and Depositions of the said Witnesses published.

To propound any Matters, Defensive Allegations, or Exceptions against the Witnesses to be produced in the said Cause, if he have any to propound.

To see and hear a Term, and Terms assigned to hear Sentence in the Cause.

To see and hear the Definitive Sentence pronounced in the Cause.

And Lastly, to be present at all the general Sessions to be held in the aforesaid Courts, (whilst the said Cause doth depend, (until the Definitive Sentence be pronounced in the same inclusively; and also an intimation must be made by the said publick Ediēt, to the said Party, that whether he do or do not appear, on the said day and place, the Judge doth intend to proceed, to receive and admit the Libel, &c. (here all the aforesaid effects of the preceding Citation must be again reiterated) his absence or contumacy in any respect notwithstanding this Mandate, or citation decree with an Authentical Certificate, of the Execution thereof being brought into Court, and the Party cited, being called publicly three times and not appearing, it shall be proceeded (in penalty of the contempt of the said Party, to all and singular the effects aforesaid re-

spectively, and also to the pronouncing the Definitive Sentence inclusively, notwithstanding the contempt of the said Party. Yet the Proctor of the Plaintiff ought to take heed that he desire nothing to be done or decreed, but in penalty of the contempt of the said Defendant, First Accused, Called, and Pronounced as Contumacious : And that this may be Lawfully done, the Certificate of the said Mandate, or original citatory decree, ought to be continued from one Court day to another Court day. For that Certificate being at a period, or (as they say) being discontinued, the said citatory decree is at a period also, and nothing can be decreed, at least, so as that the Act may avail in contempt of the Defendant. Yet although it is above-said, that the Defendant ought to be cited by a publick Edict, to all the aforesaid effects, respectively, Mr. Clarke thinks it most safe (and so he is wont to practise) after the Witnesses are produced and examined, to cite the Defendant again, in manner and form as above, to some of the aforesaid effects, (*Scil.*) to see the Depositions of the Witnesses published, to propound exceptions against these Witnesses, (naming those Witnesses in the decree) or any other matter whatsoever, if he thinks fit to use or propound any : And also to hear and see a Term, or Terms assigned for Sentence, and to be present at the pronouncing of the same inclusively, with an intimation as above. Also the like second Process may be made, if any (after Matrimony is solemnized or contracted) hath knowledge that the Party (with whom this Marriage or contract is made) did first contract or solemnize a Marriage with another, lest (as is said above) the testimony of the necessary Witnesses in that behalf should perish. But in these and all other the like cases, it is to be noted, that if Witnesses necessary to prove the Libel, were not produced, or by reason of the distance of the place, or the age of the Witnesses could not be judicially produced in that place, which the Defendant was cited to appear at, but that they are to be produced in remote parts, upon a Commission, (because the Defendant was not cited by the publick Edict aforesaid to appear in any other place, but in the judicial place, and therefore he is not contumacious to any other effect out

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of the place he was first cited to) the Plaintiff ought therefore to cite the Defendant anew, in manner and form aforesaid, to appear in the place, and on Days to be assigned by Commissioners, for the dispatch of the said Commission, to see Witnesses Produced, Received and Sworn upon the Libel aforesaid, and to see further Proceedings done, in and about the dispatch of the said Commission, according as the Law shall require, with an intimation as above.

8. Though generally Witnesses are not admitted after Publication, yet in a Matrimonial Cause they are admitted, yea without the Oath (that Witnesses are newly come to the knowledge of the Party producing them, after the Attests are published,) and admit also, that Sentence is pronounced against the Plaintiff in a Matrimonial Cause, that he hath failed in the proof of his Libel, and that the Defendant is absolved; yet the Plaintiff may (either in the same Court, or in any other competent Court) institute a new Matrimonial Cause, against the same Person, not only upon a new or second contract, but also upon the former; and thereupon may produce Proofs, whether known or unknown to him at the first. And in this case, the exception that the matter is adjudged, or that the aforesaid Sentence hath its effects, upon the matter adjudged, hinders not; because a Sentence pronounced in a Matrimonial Cause against a Marriage, doth never pass upon the thing adjudged, seeing these matters of contract have many privileges; and as often as the Church is deceived by pronouncing Sentence against a Marriage; by new Proofs, also, nay sometimes upon the very same Proofs, the former Sentence may be revoked; the reason is, to avoid the Sin and the Danger of the Soul, if an unjust Sentence should take effect and have place.

9. If the Plaintiff doth personally make Faith, that the Woman whom he Sues, doth remain with her Parents, her Kindred, or Friends, who are very much averse to the Marriage alledged, and that the said W. hath not her liberty, so as she dare not confess the Truth in this Cause; and therefore he must desire that she may be Sequestred into some other indifferent place. Upon which the Judge is wont

*See acc. 1. Ought.
Pro. 04. note
cf. 305; 6.*

wont (at the Charge of the Parry desiring it,) to Sequester her, for some days appointed at his pleasure, before her examination upon the positions of the Libel, or matter of the Plaintiff; and if upon any emergent Cause, (appearing by the answers, or proofs,) it seem fit to the Judge, he may decree her to be kept apart from her Parents and Friends, whilst the Sute depends: And it may be Lawful for the Plaintiff or his Proctor, to convene the Woman so Sequestred, at some convenient time, and read to her the Articles upon which she is to be examined, and admonish her, that when she gives her answer to the same, she speak the Truth, and beware of Perjury. This Practice is very safe; for now adays, when they are released from this Sequestration, they are wont to contract second Marriages, whilst the Sute depends. And observe, that this Sequestration is often decreed upon the bare Oath of the Proctor, alledging his belief as above. And observe likewise, that the Judge may and is wont to impose the Oath judicially to the Parry to be Sequestred, (when she is produced, and before she is Sequestred) to make a faithful answer, to the Libel, or matter, &c. but she is not to be examined, until after she is Sequestred. Also if it be requested of the Judge, he is wont to inhibit the said Woman, over and above, that (as in the ordinary Citation, in a Matrimonial Cause) she do not contract any other Marriage, whilst the Sute depends, and if she hath already actually contracted any, that she do not procure the same to be solemnized in the Face of the Church, &c. Likewise if the Woman who is thus Sued, notwithstanding this dependency of the Sute, and such an Inhibition, not to make another contract, or solemnize another Marriage with any other Man) doth contract another Marriage, &c. this being alledged and proved, she is to be Sequestred (at the Charge of the Parry desiring it) whilst the Sute depends, and likewise both she, and the Man (if he had notice of such dependance of the Sute) with whom she contracted this Marriage, are to be punished, and publickly corrected at the discretion of the Judge.

10. And although as was said before, the Woman, (whilst Sute depends, and notwithstanding such Inhibition,

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) if she contracts any other Marriage, ought to be sequestred whilst the Sute depends; yet some Learned men say, (and so Mr. Clarke hath known and had it adjudged) that if the Man, who doth thus solemnize this Marriage with the Woman, knew nothing of this Inhibition, the Sute depending, but did it *bona fide*, (that is, he solemnized the said Marriage, not knowing ought of the Sute, Inhibition aforesaid) in this case, he ought not to be punished for the Fault of the Woman, (that is, his Wife ought not to be Sequestred from him.) Therefore to avoid Deceit, (which often falls out in these cases) so soon as the Citation, and Inhibition are executed against the Woman, the Plaintiff must take care, that an Intimation and Inhibition be decreed against all Persons in general, intimating, First, that there is such a Cause depending, betwixt such and such Persons, before such a Judge, and then inhibiting them, that whilst the Sute depends they do not attempt to do any thing, in prejudice of the said Sute so depending; and these Intimations and Inhibitions are wont to be made by a decree, *vis & modis*, to be published in the Parish Church (where the said Woman is wont to Inhabit,) in time of Divine Service: And then in this case if any do contract Marriage with the said Defendant, they cannot pretend themselves ignorant of the said Sute, for there is a strong presumption of his knowledge, and he who contracts Marriage with her, is not only to be punished as a Contemner, but the Woman is to be Sequestred, as in the foregoing number: And this Intimation, and Inhibition may be executed, at such time as the primary Citation, in the Matrimonial Cause is executed, or afterwards, before the same is returned into Court.

It is very usual, (so soon as Sute is commenced in a Matrimonial Cause, if the Defendant (whether Man or Woman) doth believe that the Plaintiff can prove the Marriage alleged, or at least so fully that if no other Marriage is solemnized or contracted, the Plaintiff will prevail in the Cause,) the Defendant notwithstanding the dependence of the Sute, and the Inhibition of the Judge, doth contract another Marriage, and procure the same to be solemnized, being induced thereto by these following reasons.

sons. First, that she believes her Adversary will not (willingly however) obtain an adjudicatory Sentence for a Woman who (in his opinion) is known by another Man; and upon this supposition, that he will willingly compound, or desist from the Sute. Secondly, that the Judge will not in all probability, proceed against this contemner of his mee office no body urging it, or promoting his office. Thirdly, that although the Plaintiff will not compound the Sute, yet the Defendant may so protract the Sute, either by frivolous Allegations and Exceptions, or by Appeals, so as that in the mean time, either Death may terminate the Cause, or the King's General Pardon may abolish the Punishment of this Contempt. All these things, the Judge may perchance meet with; which things he ought to take care that they be not committed for the future (at least so frequently. And this he may do, if (immediately after it doth appear to him, or that he hath any knowledge of this Contempt) he do proceed against these contemnors, having no respect to the Proofs of the Adversary, nor to the Persons contemning, but only to the Contempt it self. For a Contempt of the Law, and of the Judge, is neither greater nor lesser whether the contract alledged be proved, or not proved. The Judge also shall avoid these daily Contempts, if in the Interrogatories which he Administers against these contemnors, he Interrogate them, whether or no any Advocate or Proctor or any Proctor's Clerk, or any other Officer or Minister of his own Court especially gave them this Counsel, to solemnize this Marriage or Contract: And if any Advocate or Proctor is justly suspected upon this account (for a just suspicion may appear by the Client's Confession) he may be suspended from his Office, until he purge himself Lawfully of this suspicion; and if he be convicted thereof he is to be suspended * for a year, or during the pleasure

* *Lindwood*, de of the Judge.

postuland. c. 1.

verb. Matrimonia.

ac per totum caput de

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12. Though every Matrimonial contract, which any one pretends to dissolve a Marriage, (already Lawfully solemnized, and consummate, and confirmed by daily Co habitation together,) ought to be proved by two Witnesses (at the fewest) who are without all exception, yet this special privilege, is not allowed to Persons who solemnize

solemnize Marriage clandestinely, † or Unlawfully, (that is, † *Ligamin^e*
 whilst the Sute depends, and against the Inhibition of the *prioris conjugii*
 Judge.) For if this were permitted and suffered, or that *durante secun-*
 the said Laws were to take effect in clandestine Marriages, *dum contract-*
 there were just cause given to the Persons in Sute, to con- *um non valet.*
 tract and solemnize Marriage, whilst the Sute depends, *Wesemb. parat.*
 when once the attestis of the Witnesses of the Adversary are *ff. de rit. nup. n.*
 published, that they can inform themselves, that Sentence *8. colum. 962.*
 will be given for the contract alledged, if they do not con- *Litt. E. Myns.*
 tract a second Marriage: And this is indeed frequently *Inst. de nup. Sec.*
 done. And indeed of late Years, many Advocates and *si adversus, de*
 Judges have been of opinion, that the aforesaid Laws take *pœnis injustar.*
 place, even in clandestine Marriages: But Mr. Clarke says, *nup. n. 3. Lind.*
 that to his certain knowledge (he having been present, *de clandest. de-*
 and hearing it debated in some weighty Causes, betwixt *sspons. c. quia*
 some worthy Persons) several Eminent Judges, and Re- *Señ. omnibus.*
 verend Divines, were of a contrary opinion: One of which *verb. solennem*
 Judges, having heard certain of the Learnedest Advocates *ed. Matrimonii*
 eight in number) who were Fee'd on both sides, dispute *um contraben-*
 touching this question, (*viz.* whether or no a Marriage, *tes impedimen-*
 solemnized whilst the Sute depends, and against the Inhi- *to aliquo cano-*
 bition of the Judge, doth enjoy the same priviledges, as *nico obstante fi-*
 * Matrimony which is Lawfully solemnized) and having *lii eorum repu-*
 appointed a time, to pronounce his Definitive Sentence in *tentur illegiti-*
 the Cause, and having both the Sentences in his Hand, *mi. & ibid. c.*
 that is, both the Sentence of the Plaintiff, and the De- *humana verb.*
 fendant) he desired one of the Learnedest Advocates (of *impedimenta*
 the Party who solemnized the Marriage whilst the Sute de- *canonica, &*
 ended,) that he would deliver his Opinion ingenuously, *Joh. Ananias*
 and sincerely, (as in the Presence of the most High Judge,) *super. 40. de-*
 and answer freely which of these Sentences he would pro- *cret. de spons.*
 nounce in the Cause, if he were Judge: Whereupon this *Inst. Señ. affini-*
 Advocate pausing a little, (being doubtful as it seems what *tati de nuptiis.*
 to answer) said at last, that if this second Marriage had ** Que sunt.*
 not been solemnized, he would have given Sentence for the *eadem privile-*
 Plaintiff, as of right it ought, that is, for the Marriage *gia. vid. Hosti-*
 alledged, and Libelled. Then the Judge said, I approve *ensis, qui ma-*
 Learned Doctor) this your Opinion; and seeing it is *trim. accusare.*
 with what Conscience, or Equity can I be moved to *possint. c. vide-*
 regard this Clandestine, and Thievish Marriage (as he *tur. verb. favo-*
 was *rabilis, super*
decret.

was pleased to call it,) and give Sentence against m
Conscience, to confirm the aforesaid illegal Marriage
and thereupon rejecting that Sentence, (*viz.* the Sentence
offered for the Marriage, which was solemnized whilst th
Sute depended) he pronounced Sentence for the Plaintiff
revoking, and declaring the second Marriage to be null
But upon this question, consult the Learned Judges and
Advocates: Though certainly, if the Laws should dem
to allow these clandestine Marriages, the privilege of th
Just and Lawful Marriage, so many would not adventur
to contract, and solemnize second Marriages whilst th
Sute depends, and against the Inhibition of the Judge.

13. If the Defendant being Excommunicate and Imprisoned, for not solemnizing the Marriage, according to the Sentence of the Judge, doth appear by his Proctor, and the said Proctor (exhibiting his Proxy) doth offer himself ready and prepared to take the Oath, of obeying the Law and standing to the Mandates of the Church, and doth alledge, that his Client is ready and prepared to solemnize the Marriage, upon any day to be assigned by the Judge and that therefore he doth desire, that he may be absolved from the Sentence of Excommunication until a certain day, or under a Cautele; and then (giving sufficient Bond that the said Party will so obey the Law, and stand to the Mandates of the Church, and also that he will solemnize the Marriage with the Plaintiff on that day, assigned by the Judge for that purpose) the said Party is to be absolved until a day, (*viz.*) until the next Court, immediately following the day assigned for the Marriage. And here it is to be noted that although the Defendant, who is Excommunicate (in other Causes and Cases) for any Crime or Ecclesiastical Contempt, is not to be absolved until he satisfy the Mandate of the Judge, as to that thing for which he was Excommunicate: (For Example, any one being Excommunicate for not paying Charges, Tithes, Legacy, and Procurations, is not to be absolved until he pay them. Also any one being Excommunicate in not answering to a Libel, is not to be absolved, until he make his answer) yet seeing Marriage cannot be solemnized by Excommunicate Persons, therefore in this case, the afore

said

aid caution being interposed to a day, or under a Caution, and the aforelaid Oath being taken, of obeying the Law, &c. the Excommunicate Person is first to be absolved ere the Sentence can have its effects.

14. If in a Matrimonial Cause, the Plaintiff doth prove a Matrimonial contract, by one sufficient Witness, who is without all exception, and doth prove a treaty by others; or doth prove an acknowledgment by two Witnesses, the Parties being present (Mr. Clarke says he has seen a condemnation of Charges, where the Plaintiff hath proved by two Witnesses an acknowledgment, though in the absence of one of the Parties, so as the treaty of Marriage were proved) or if he proves a contract for a future Marriage, by two Witnesses, and a treaty by the same or other Witnesses; or doth prove an immediate Marriage by two Witnesses, and these proofs are afterwards taken away, by lawful exceptions unknown to the Party producing them; or if the proofs of the Plaintiff are made difficult, that is, if the Witnesses do cease to be without all exception, by reason of a former contract or Marriage, or by a subsequent solemnization of a Marriage made whilst the Sute depends; in these cases, the Judge is wont (although he have pronounced Sentence for the Defendant) to condemn the said Defendant, so obtaining the Sentence, in Charges made by the Plaintiff. But if it is proved that there was a treaty made (and often reiterated) as well of the Marriage, as of the Dowry to be assigned, and a mutual giving and receiving of Rings, in this case, the Judge is wont to absolve the Plaintiff from Charges of Sute, seeing he may be said to have just cause of contesting. *

* Lanfranc. c. quoniam de ex-
pens. n. 2. &
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15. A Sentence being pronounced in these Causes, for Marriage, the Defendant is to be called to shew Cause, why the Sentence already pronounced, may not be put in execution: And that a verbal Execution may be made, it is to be proceeded as in other Causes, when Sentences are verbally put in Execution; and after Sentence is demanded to Execution, a Monition is to be decreed against the Defendant, in order to cause him (or her) to solemnize the Marriage with the Plaintiff, before such a Feast, or otherwise the said Defendant is to be cited to appear on such

such a Day, after the said Festival is elapsed, to shew cause why he may not be Excommunicate for his (or her) Contumacy. Then the Party desiring the Marriage to be solemnized, must procure a Licence or Dispensation, in order to the solemnizing this Marriage (without publishing the Banes) in any Church. Then the Plaintiff must go to the Defendant, and request him to this Marriage, and appoint some certain Day for the solemnizing thereof: And if he or she cannot meet with the Defendant to speak with him in order to this, let them send some other Person who is likely to meet with him. And if the Defendant will not appoint a Day for the celebrating this Marriage, nor will return any answer to the Plaintiff's request, then the Plaintiff must appoint to himself, some Lords Day, or Festival, on which he may endeavour to procure this Marriage to be solemnized in such a Church, and this his Intention he ought to signify Personally to the Defendant, or at least he ought to protest the same, before Witnesses, then on that Day appointed, the Plaintiff must go to the Church which was appointed for this purpose, and must take care, that a Minister be there ready, expecting the coming of the Defendant, in order to solemnize the Marriage, and if the Defendant comes not, the Plaintiff must protest his diligence and presence, &c. before these Witnesses.

16. Upon the Day assigned for the return of the aforesaid monition; the same is to be certified to the Judge with a Certificate indorsed thereupon, making mention of the due Execution thereof. And for a further Cautele, the request which was made to the Defendant, to solemnize this Marriage, and the assignment of a Day, and all other the Premises may be alledged, and the Plaintiff must make Oath thereof: Then the Contempt of the Defendant must be accused (being admonished to solemnize the Marriage upon such a Day, or to appear on such a Day and in such a place, to see himself Excommunicate, and not taking care to solemnize the Marriage, nor to appear nor alledgeing any Cause, why he may not be Excommunicate; Then the Judge must cause the Defendant to be called three times publicly, and if he appear not, he is to be pronounced

pronounced contumacious, and is to be decreed Excommunication, and is to be proceeded against, as in other Ecclesiastical Causes. And if the Defendant is cast into Prison, upon the King's Writ, *de Excommunicato capiendo*, he is there to be kept until he solemnize this Marriage, and satisfy the Church for his Contempt.

17. Now the Defendant refusing to solemnize the Marriage notwithstanding the Oath, or Bond which was given to solemnize this Marriage, with the Plaintiff, upon the Day appointed by the Judge, (under colour whereof, the said Defendant hath got an absolution to a Day, or under a *cautele*) in this case, how the Defendant must be proceeded against, is a thing very much controverted (*Scilicet*) whether or no the Judge (by virtue of the first Excommunication, which was denounced) can signify the said Defendant to the King's Majesty, and obtain a Writ for his apprehension, (seeing he was absolved only to a Day, and that Day being elapsed, he doth again fall under the former Excommunication,) or whether or no the Judge ought *de novo* to admonish the Party again, to solemnize the Marriage before another Day, under Penalty of Excommunication, and then proceed to denounce the Excommunication, and do all other matters and things, in like manner as was directed in the fifteenth number foregoing. *Clarke* says, he always used the last method of proceeding, and he accounts it most safe so to practise in this case, to remove all Jealousies. And seeing in the aforesaid case, the Judge was circumvented by the Defendant's promising that he would solemnize the Marriage, (under colour whereof he got his absolution,) and seeing he was a manifest Contemner of the Judge, and of the Jurisdiction of the Church, the Judge may, and of right he ought to seize the Party (who is thus grieved and injured by the delay of his Adversary, and by this retarding the Sute) and make him a Bond (which was taken for the solemnizing this Marriage, before a certain Day) and make him a Letter of Attainder, for the recovering the Forfeiture of this penal Bond, according to the common Law; and this is especially necessary to be done, if the Party after he is freed out of Prison, by virtue of the said absolution to a Day as above) doth so
absent

absent himself, as that the Plaintiff cannot cite him *de novo*, to the effect aforementioned : And then the Bondsmen for their own safety, will cause the said Party to stay in Court, &c.

18. In all Causes which concern the Goods or Person of any one, a third Person may come in for his Interest (as wit) in a Matrimonial Cause, a Cause about a Living, Testamentary Cause, a Cause of Temerary Administration And first, in a Matrimonial Cause ; If a Man Sue a Woman in a Cause of contract, and that Woman doth either solemnize, or contract Marriage with another ; this third Person may (if he will) come in for his interest in the said Cause, in any part of the Proceedings, yea though the Cause be concluded, whether he come with an intention to assist or remove the Defendant, yea although he may have notice that the Sute hath depended, and that the Plaintiff has proved his Libel, &c. the reason is, because the Cause is a Cause of great privilege ; and in these Matrimonial Causes, it is controverted as to the peril of the Sute, and therefore the publication of the Witnesses, and conclusion in the Cause, doth not hinder, but that a third Person (alleging a former contract, and a First Marriage, and making Oath, that he doth not propound this Interest, out of a malicious mind, or with an intent of removing the Sute, and that he believes he can prove the same) may be admitted to alledge, propound, and prove this his Interest, notwithstanding the Witnesses are published, and the Cause concluded. But in the other Causes above mentioned, a third Person coming in for his Interest ought and is wont to proceed in the same State, in which the Cause was at the time of his coming in ; and the Proceedings ought not to be stopt, but the Plaintiff may proceed against the Defendant, as if a third Person had not come in for his Interest : But this is only to be understood, when that third Person doth come to assist the Defendant : it is otherwise, if he comes in, with an intention to remove the Defendant, who makes a collusion with the Plaintiff in prejudice of the said third Person. For in this case the third Person may stay the Proceedings against the Defendant ; yet it is meet, that this third Person do sp

this collusion in his Allegation, and the Causes wherefore the Defendant is to be removed : Nor is it sufficient (as Mr. Clarke has heard from very Learned Persons) that this third Person do alledge generally, and in the common form in his Allegation, (*viz.*) *Omnibus melioribus & efficacioribus, via modo & juris forma, &c.* but he must alledge in these general words, (*viz.*) *Et præsertim animo removendi reum, & detegendi collusionem inter eum & Actorem, in præjudicium istius tertii.* Also in a Cause about a Living, or Benefice, to wit, in a business of double querele, if it be contested for a Benefice betwixt a Bishop and another Clergy Man, (who is presented to it,) who doth desire his Institution instantly : Because sometimes the Bishop will not alledge his right, (that is, that a third Person doth possess this Benefice already, and that the Church is not vacant, in respect of this third Person;) in which case the Judge to whom it is complained, is wont to pronounce for his Jurisdiction, and to decree the Party complaining, to be Instituted to the said Benefice : Therefore it is expedient in this case, that this third Person who has the Living already, do come in, and alledge his Interest, lest another be Instituted to the same. Likewise if in a Testamentary Cause, (where there are considerable Legacies left you,) the Executor of the Will, intending to make void this Will, in which these Legacies are left, and to get it declared as null by the Sentence of the Judge, and so avoid the payments of these Legacies; in order thereto this Executor is wont to collude, (at least he may so do) with some of the next of Kindred to the deceased (who would have had an interest in the Goods, if the deceased had made no Will) to call this Executor, to prove this Will by Witnesses : And the Executor (thus colluding) making default in the proof thereof, he may obtain Sentence against the Will, although for form sake, he have alledged the Will, and taken upon him to prove the same by Witnesses. And this may also be done, if the Executor is not called by, but doth call the next of Kindred, (who do collude with him,) to see the Will proved by Witnesses, &c. in this case, the Legatee concerned may come in. To these cases may also be added a Cause Instituted for a Legacy : For the Executor not ha-

ving sufficient Goods to pay the whole Legacies, yet being willing that the residue which is in his hands, should be paid to the Kindred, and Friends who are Legatees, he may collude with some one or more of these Legatees, and get them to Institute an Action against him for these Legacies, and may obtain the Sentence of the Judge for the whole Legacy : In which case the Executor is freed by the Sentence of the Judge, if he pay these Legacies adjudged : Which being paid, he hath fully Administred, so as there remains nothing more to pay the other Legacies. But yet quære whether or no the Executor (knowing in this case that there are more Legacies due,) shall be freed by this Sentence. Mr. Clarke says, he has known it thus adjudged. It is very requisite therefore that the other Legataries, (so soon as they have notice of these collusions) do come in for their Interest in the same Court, or Cause so Instituted, and desire their Legacies, or at least that they may have a share out of that residue of the Testators Goods (which remain in the Executors hands) according to the rate and quantity of their Legacy.

S E C T. 2.

Of Divorces.

1. *The manner of desiring Charges of Sute and Alimony in any Matrimonial Cause, betwixt a Husband and a Wife.*
2. *A necessary clause to be inserted in the Libel, when the Wife sues her Husband, &c.*
3. *The tenor of a Sentence in a Cause of Divorce, or rather in a Cause of Separation from Bed and Board in cases of Adultery or Cruelty.*
4. *The Causes which are to be considered by the Judge in a Cause of Divorce for Adultery.*
5. *The Causes which hinder a Separation, although the Party convened hath committed Adultery.*
6. *The Causes which hinder a restitution in a Matrimonial Cause.*

IN every Cause where the Wife sues her Husband, (or contrarily) so soon as it doth appear to the Judge, either by the answers of the Proctor of the principal Party, or by the Proofs, that the Marriage was solemnized betwixt the Parties, the Proctor of the Woman must alledge, that it doth appear by the Acts of the Court, by the Libel of the Adversary (when the Man sues his Wife in a Cause of Divorce, or in a Cause of restitution of the conjugal Yoak) or by the answers of the Proctor, or of the principal Party, that the Marriage was solemnized betwixt his Client, and M. the Adverse Party, referring himself to the Acts, the Answers, the Libel, or the Witnesses examined in that behalf; wherefore he must desire that the said Husband may be condemned in Charges of Sute, and Alimony; then if the Marriage thus alledged doth appear to the Judge he is wont to condemn the Husband, according as is requested. Then the Proctor of the Woman must give the Judge a Schedule of the Charges of Sute, at the end of which Schedule, he must Write on this manner, (*Scil.*)

‘And the said Party N. doth desire Charges of Alimony, from the day of the date of the primary Citation, for and during the whole Sute, according to the rate *.’ (Leaving

a space, that the Judge may set down the sum, which is to be decreed for every Week from the aforesaid time, until the end of the Sute.) Then the Judge must first Tax the

Charges of Sute; and then if the ability of the Husband doth appear to him, he may Tax the Charges of Alimony at his pleasure, on this manner: ‘We Tax the Charge of

Alimony for every Week, from the time of the date or return of the primary Citation, (if he see it convenient) to such a Sum to be paid during the dependance of this

Sute, unless it shall be otherways decreed by us. For it is to be noted, that the Adversary may in any part of the Sute, to avoid a further Allowance or Taxation of the

Charge of Alimony) however that they may be moderate. taxed, alledge and prove his Poverty, or that he is de-

prived in his Estate, since the decree of the Judge was imposed for these Charges of Alimony; but the Judge ought to take heed, that he be not circumvented in the aforesaid

In taxatione alimentorum consuetudo & qualitas ejus cui assignantur, sint consideranda. Marchi Sol. Recol. qu. 10. n. 8. q. 74. n. 4. Jacob. Fab. de aliment. Pon. tan. de aliment qua vocantur alimenta Myns. Inst. de Action. Sect. Item. si. n. 4. & observ. Cameral. cens. 3. obs. 12. Guid. Pap. decis. 439.

Taxation, (to wit, from the day of the date of the Citation) for sometimes the Plaintiffs take out the Citations, but do defer to Execute and Certifie them, of a years time or thereabout, afterward : Which fraud being found out by the Judge, he may Tax the Charges of Sute, and allow Alimony from the Day of the bringing in, or return of the Citation.

2. The Proctor of the Wife may propound, and alledge in his Libel, the value of the Goods, which the Husband had as a Portion with his Wife, at the time of Marriage, and the value of all such Goods as the Husband doth possess, that a certainty of the value may appear by the answers of the Husband, and that thereby the Judge may be informed as to the sum to be Taxed. The Judge may also be informed of the Ability of the Husband, by the relation of the Neighbours, or some other way. And although the Husband doth offer himself ready and prepared to prove that his Wife is an Adultress, or that she hath elsewhere to maintain her self withal sufficiently, and to pay the Charge of Sute; and admit that the Husband doth prove these alledgments by Witnesses, or that the Witnesses do fully depose, that these alledgments are true: Yet the Judge ought to allow these Charges of Sute, and this Alimony, unless it be concluded in the Cause; for nothing can be said to be proved, so long as any thing can be Propounded and Proved by the Adverse Party. For the Learned Civilians say, that nothing is said to be proved before the Sentence is Pronounced, at least so long as the Adverse Party may except against the Witnesses. *But quare.* Now the Charges of Sute and Alimony being Taxed, the Judge is wont to decree a Monition for the payment of them, as in other cases. And observe, that in the aforesaid Taxation of Alimony, the Judge is wont to allow the Wife a third, or at least a fourth part of the yearly value of the Land, or immoveable Goods, and if the Husband hath no immoveable Goods, then the Charges are to be Taxed according to the common Account of the value of the moveable Goods, and according to the Quality of the Husband, as shall seem fit to the Judge.

3. Now although it was said at the first number† of the

* *Hyms. Inst. de Action. Sect. Item si. n. 5, 6. ac per tot.*

† *Vide qua ibi notantur in Marg.*

foregoing Section, that a Husband or Wife, for several reasons might sue in a Cause of Divorce or Separation from Bed and Board; yet by the Canon Law, which is approved and confirmed by the Laws of this Realm in this behalf, it is not Lawful for Persons who are Divorced in these cases, (*viz.* either for Adultery or Cruelty,) to betake themselves to a second Marriage whilst their former Husband or Wife are alive; because the Matrimonial Bond of a Matrimony once perfected, cannot be dissolved by Man, but only by Death. Therefore in every Sentence Pronounced in these cases, this Clause is inserted: (The said *N.* and *M.* that is, the Parties, who desire to be Divorced by reason of Adultery [if the Cause were instituted for Adultery] or by reason of the Cruelty Alledged and Proved, we Separate and Divorce them from Bed, Board, and mutual Cohabitation, and from the Yoke of Wedlock, until such time as they are mutually reconciled to each other, and not otherways, nor in any other manner. (This word *Divortiamus* is often admitted.) Also to avoid these second Marriages, whilst the former Husband or Wife are alive, (being a thing frequently done) the Judges are wont expressly to inhibit these Persons thus Separated, that they do not betake themselves to any other Marriage, with any other Persons, during the Lives of them two thus Separated, with an Admonition also, that they abide unmarried, unless they be mutually reconciled to each other. And as often as it is complained of these second Marriages (of either of these Parties thus Separated,) before the King's Chief Commissioners in Ecclesiastical Causes, or before the Judges of the Arch-bishop of Canterbury, the Parties who offend in these cases, are Punished and Corrected, and are Divorced and Separated from these second Marriages, or rather from these Adulterous Wedlocks.

4. Seeing that in these our Days (through the Instigation of the Devil) very many Divorces are asked, or sued for under pretence of Adultery; that so by that means, the Parties thus Separate, may betake themselves to a second Marriage. And that this Divorce may be the easier obtained, the Wife is wont to confess the Adultery?

whereof she (under colour) is accused; though in very deed there was not any Adultery committed. Sometimes also the Husband (that so he may Marry another Wife,) doth (either by threatnings, stripes, or fair words, or some other unlawful means) induce his Wife to confess Adultery, although she never committed any; therefore to remedy and avoid this Deceit and Fraud, the Judge in these cases, is wont (all Persons being removed apart, and especially the Husband) secretly to question some Friend of the Woman's, and also examine the Woman herself diligently touching the Truth, and the Cause of this her Confession; and use all other lawful ways and means to inform himself of the Truth. And if he can find out this Deceit and Fraud, or at least if he finds any probable suspicion of it, he is wont to forbear to pronounce a Sentence of Divorce, unless the Party who desires this Sentence of Divorce, doth prove this Adultery by Witnesses, or at least by vehement presumptions, and publick fame; or unless the Judge is satisfied in his Conscience, of the probability of this Crime being true, as objected; so as he can believe that the Confession of the said Woman, touching the Adultery committed, did not proceed from her out of Deceit or Fraud. The Judges also had need take care that the Person brought before them, to confess the Adultery mentioned in the Libel, be not some counterfeit Person (which Mr. Clarke says, he has known twice done in his time) though it be Alledged before him, that that is the Wife of the Man who desires to be Divorced. Therefore the Judge shall prevent this Deceit and Fraud, very easily (if he suspects it) by taking care to get some Persons of credit, to be present before him, (at the time of Pronouncing the Sentence) who have certain knowledge of the Woman confessing this Adultery, &c.

5. A compensation of the Crime, doth hinder a Divorce, that is, if the Defendant doth prove, that the Plaintiff hath also committed Adultery, the Defendant is to be absolved, as to the Matters requested in the Libel of the Plaintiff. Likewise if an Action of Divorce for Adultery, is instituted by a Woman against her Husband, or by a Husband against his Wife, to obtain a Divorce for Adul-

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tery; If the Defendant in this case, doth Alledge and Prove, that the Plaintiff (before this Sute was instituted) had knowledge, or at least a probable foresight of this Crime Committed, and Libelled, and yet notwithstanding this, had afterward a carnal Commerce with the Defendant; the Plaintiff in this case, shall not obtain a Sentence of Divorce: Because in this, the Plaintiff may be said to have remitted, and pardoned the Crime objected. Now a probable knowledge in this case, may be said to be, if the Husband suspecting his Wife of Adultery, doth accuse her of it, and she confesseth it when Taxed therewith: Or if those Witnesses, whom the Husband produceth in a Court of Controversie, to prove this Adultery objected, did signifie to the Husband before the Sute was begun, that they could depose or testifie this Adultery, having seen and known the same to be committed: Or if the Husband took his Wife in the very Act of Adultery: In these cases, if the Husband hath carnal knowledge of his Wife afterwards; he doth seem to remit the Injury, and therefore ought not to be Separated from his Wife. Therefore in this case, let the Husband forbear to lye with his Wife, (if he intends to be Divorced from her) although he doth not immediately put her out of his House.

6. Proof being made that (after the Marriage is Contracted, or since the Marriage was Solemnized, and that the Wife went from her Husband, or the Husband from his Wife,) the Husband, or the Wife have committed Adultery, it is sufficient to hinder a Restitution in a Matrimonial Cause: Yet in this case, if the Plaintiff doth reply, and prove a compensation or knowledge, a Pardon or a remission of the Crime as above: he shall obtain the Restitution as desired. The Causes also which are mentioned in the first number of the foregoing Sect. may be propounded to hinder this Restitution; being such as render the Marriage (already Contracted) Null.

CHAP. II.

† *Contumacia* Of Contempts † against the Ecclesiastical Laws, and Magistrates. The order of punishing them.

S E C T.

† *Contumacia* qua sit, & quis dicatur contumax quot modis committitur, qualiter contra contumacem procedatur, qua poena contumacia, & quo ordine sint infligenda, plenius reperias apud Alcat. in prax. a fol. 86. ad fol. 100. etiam Hostiens. t. si quis jus dic. in sum. n. i. de contum. Ummius disput. 6. n. 3. Ord. Cameral. p. 3. tit. 14. Jacob. Blum. proc. Cam. t. 66. Jacob. Ayres. processus p. i. c. 4. obs. 3. n. 6. contumacia est erga judicem commissa inobedientia.

1. The manner of desiring a Decree, in a matter of Contempt, committed in a Matrimonial Cause.
2. The manner of Alledging a Contempt in other Causes.
3. The manner of Proceeding in a Cause of Contempt.
4. The manner of Giving and Exhibiting Articles in a Cause of Contempt.
5. The manner of Proceeding in these Causes, where the Defendant doth confess the Contempt.
6. The manner of Proceeding in this Cause if the Defendant doth deny the Articles.

THE Proctor who desireth a Decree, and a Citation to be decreed in a Cause of Contempt, ought to draw up a Schedule, containing briefly the Causes of Contempt: Which Schedule, he who is Advocate in the Cause is wont to read publicly in Court, it being drawn up under this form of words. ‘ Reverend Judge; from this famous Court, were taken certain Letters Citatory and Inhibitory at the instance of one N. against M. to answer the said N. in a Matrimonial Cause, and to Inhibit the said M. the Woman that she should not (whilst the Sute depends) Contract any other Marriage; and that if in case, she should have contracted any, that she should not procure the same to be Solemnized in the face of the Church, under penalty of the contempt of the Law, and that these Letters Inhibitory, were duly executed upon the said M. according to the form, force and effect of the same. And that notwithstanding these your Letters Inhibitory, and the Execution of the same, the said M. (in contempt of the Law, and of your jurisdiction) hath contracted a certain

pretended Marriage with one O. and hath procured the same to be Solemnized in the face of the Church, &c. Wherefore I desire that the said Party may be cited to appear upon some competent Day, to be by you assigned, to answer personally to certain Articles, concerning this contempt towards you, and your jurisdiction. Then the Judge doth decree the said Party to be called to answer personally against such a Day as is desired.

2. In other cases, the Schedule for a contempt, is to be drawn and read (as above) by an Advocate, in these words: 'Reverend Judge; from this Court were taken certain Letters Citatory, at the instance of one N. against M. to answer the said N. in a Cause of Defamation, or the like: And that these Letters Citatory were Sealed with the Seal of your Court, and in order to the Execution of the same, they were delivered to one L. your Mandatary, lawfully constituted in this behalf. And that your said Mandatary, did execute this Mandate upon the said M. and that the said M. violently snatched this Mandate out of the hands of your said Mandatary, (in contempt of your Court and Jurisdiction) and tore the same: And likewise at that time, and by reason of the Execution of this Mandate, he not only uttered reviling words against the said Mandatary, but also beat and smote him with a Staff, (or some such like thing, according as the matter was: Always adding) that this was done by reason of the Execution of the Mandate of the Judge, and in contempt of the Ecclesiastical Law, and its Jurisdiction; (lest it should be pretended, that this business doth belong to the common Law) and I do desire (as above in the foregoing number; and the Judge ought also to decree as was spoken there.)

3. Against the Day of the return of the Citation, the Proctor promoting this matter of Contempt, must take care to draw up into Articles, the Causes of this Contempt, in the name of the Judge, by way of Objections. (*viz.*)

In the Name of God Amen. *We N. official, &c.* (here recite the style of the Judge, who administers these Interrogatories) *do give and administer to you M. all and singular these Articles, or Interrogatories (which concern*

a contempt offered to us, and to our Jurisdiction) of our mere Office, or at the promotion of O. (if the Judge has in mind to proceed of his mere Office) to each, and every part of which Articles, we will, and require you the said M. to make a true, a plain, a full, and a faithful answer, (upon your corporal Oath) and we do Object an Article, jointly and severally as follows, &c.

4. If the Judge intends to proceed of his mere Office he shall assign some Proctor of his Court, as a necessary Promoter of his Office, who must say, 'I take upon me the burthen of Promoter of the Office of the Judge, and I do give and administer Articles, and desire that it may be proceeded summarily and plainly. Which the Judge decrees. And then the principal Party is to be produced upon these Articles, if he be present in Court. But if the Office of the Judge, is promoted by a voluntary Promoter, or his Proctor (who must Exhibit his Proxy for the said Promoter) he must say, I give Articles, and upon these Articles, I produce the principal Party, here present in Court, whom the Judge must swear to make a faithful answer, to the said Articles, against the next Court, and admonish the said Party, to appear at the next Court to acknowledge his answer; this acknowledgment is wont to be made in the presence of the Proctor of the Party who promotes the Office. And observe that in these matters of Contempt, whether moved of the mere Office, or by a Promoter, it is not lawful for any Proctor to appear for the Contemner, nor for any Advocate to plead in his behalf, until the said Defendant has given his answer: Nor then neither, until the Judge his leave be first asked and obtained; nor shall the Defendant have a copy of the aforesaid Articles, before he be examined upon them. Yet here it is to be noted, that although it was said above that if the voluntary Promoter of the Office, be not present in Court to give in the Articles; his Proctor having Exhibited his Proxy for him, may give in those Articles. Yet Mr. Clarke doubts very much, whether or no in this case, where the Office is voluntarily promoted, or whether or no, in a Cause of Correction, originally moved at the instance

instance of any one, a voluntary Promoter can constitute Proctor, before Sute is contested? Because a voluntary Promoter, although he have sufficient Interest to promote, and in this case to implore the Office of the Judge, that Crime may be punished, being also of publick concern; yet *quare*, whether or no this Promoter can constitute a Proctor to carry on the Sute, before the Sute is contested, and whether or no the Acts and things done by such a Proctor, are of any force? Mr. *Clarke* thinks they are of no effect; and he is induced to believe so, because that above Five Years ago, he very erroneously gave in Articles in the Name, and by vertue of a Proxy, from the Promoter of the Office; and at his Petition, Sute was contested by the Proctor of the Adverse Party: Which being done, he began to doubt with himself, whether or no these things thus done by him, as Proctor of the said Promoter, were of any effect. Therefore he consulted two Advocates (who were fee'd in the Cause,) upon this Question; who making some doubt herein, deliberated upon for a day or two; and then returned him answer, that all things so done by him as Proctor of this Promoter, before the Sute was contested were void. * Whereupon in pursuance of their Council and Advice, he subducted and desired that all things done in Court by him, as Proctor of the said Promoter, might be accounted as subducted: and he offered himself ready to pay all such Charges as were due, and should be Taxed by the Judge, by reason of this Nullity; which Subduction, the Proctor of the Adverse Party accepting Mr. *Clark's* Clyent was condemned in Charges, which the Judge Taxed to Forty Shillings; which were also paid down by Mr. *Clarke*. And then the voluntary Promoter appearing Personally in Court, he gave in the Articles, already Exhibited in presence of the Proctor of the Defendant, and desired that an answer might be given to the same. And then Sute being contested, the said voluntary Promoter, constituted and appointed Mr. *Clarke* for his Proctor: And afterwards he obtained sentence in the same Cause, with Charges, and a publick expence was enjoyned the Defendant.

5. If the Defendant confesseth the Contempt objected,

then

* Nonne eadem esse videtur Analogia inter procuratorem ad litem & promotorem officii? Si ita si certe procurator a promotore litis non magis quam a procuratore ad litem ante contestationem litis, constituitur. Alciatus in prax. fol. 53. Sect. quando contra procuratorem opponatur ratione constituentis. vers. prima.

then the Proctor of the Party promoting the Office, (acknowledgement being made of the answers of the principal Party) must first accept these answers, so far as they make on his part, and on behalf of the Office of the Judge, and must alledge, that the intention of the Judge and of the Party promoting the Office, (mentioned in the Articles of contempt,) is sufficiently founded upon the answers of the Defendant, referring himself to those Articles, Answers, and to the Laws: Wherefore he must desire, that the said Party may be pronounced for a Contemner, and that Penance may be enjoyned him, that as so he may be condemned in Charges, and that Right and Justice may be done: From which Petition, the Defendant dissents, and denies the matters alledged by the promoter. Then the Judge assigns to hear his pleasure upon this Petition, and to hear his final Decree upon the next Court Day; or the Judge may if he will, upon the same Day, in which the Defendant acknowledged his Answers, if the intention of the Office is sufficiently founded thereby (the aforesaid Petition being made by the promoter of the Office) pronounce him a Contemner, and enjoyn him Penance, and condemn him in Charges. For observe as above, that by the Custom and Statutes of the Court; these Causes are Summary Causes, (at least they are usually summarily proceeded) and a contrary defence is seldom admitted against the Confession or Proofs, which make for the intention of the Judge or his Office, (although the Party confessing would perhaps qualify or extenuate that Confession) nor is the Defendant permitted to except against the Witnesses that are examined on behalf of the Office, in order to make his Penance the more easie.

6. If the Defendant doth deny the Articles of Contempt the Proctor of the Party promoting the Office, (whether he be voluntary or necessary) may desire a Term to be assigned him, to convince the Defendant; which Term assigned, is instead of the Term Probatory: And proceeding being made, they must proceed in all things, as in a Summary Cause. And observe as above, that these Causes are said to be favourable Causes, and there is not

full and direct proof required in these, as in other Causes. For sometimes there is no further proof required, than the sole Oath of the Mandatary, at least if he be a publick Mandatary, and one who is of honest account, especially if any other circumstances or presumptions occur. And if the Contempt is proved, the Party promoting the Office, must desire a Term to be assigned, wherein the matter may be discussed, and the final Decree may be heard. Then the Judge (conclusion being made in the Cause, as in other summary Causes) may pronounce Sentence against the Contemner, to the effect above specified, or he may by his Interlocutory Decree, pronounce as above.

C H A P.

C H A P. III.

The manner and order of an Executor or Administrator making their Accounts. When called thereto.

S E C T.

1. *Of the Oath of the Party Accounting upon those Sums which are under forty Shillings.*
2. *The general Oath of the Party Accounting upon all the Sums contained in the Account.*
3. *In what Case a Party who is called to give an Account or to Exhibit an Inventory, is not bound to appear personally, but may appear by his Proctor, to object to the Party calling him to an Account, has no Interest.*
4. *What Persons are said to have Interest to call the Executors or Administrators, to Exhibit Inventories and make Accounts.*
5. *The manner of proving the Interest of a Creditor, if it be denied.*
6. *Of other Persons that have Interest to call the Executors or Administrators to an Inventory, and an Account.*
7. *The Party who is called to give an Account, whether of the Office of the Judge, or at the instance of a Party, ought to appear Personally.*
8. *The Executors or Administrators may call the next Kindred to the Deceased, to see an Account given, and the Letters of Quietus est, or Acquittance granted upon the full Administration.*
9. *The manner of justifying and proving an Account by Witnesses.*
10. *The form of drawing an Account, (whether of the Office of the Judge, or at the instance of a Party) in a Court of Controversie.*
11. *The manner and form of alledging the insufficiency of the Goods in a Court of Controversie.*
12. *The Party Accounting, in order to prove the Estate of the Deceased.*

Ability of the Deceased, ought to Exhibit an Inventory of the Deceased's Goods, in a Court of Controversie.

13. *The manner of objecting against an Account.*

14. *The benefit of drawing, and judicially exhibiting an Inventory.*

15. *In what case, the Party accounting, or his Proctor, may decline the Judge of the Prerogative Court, and except that he is no competent Judge.*

16. *The manner of alledging and proving the Jurisdiction of the Prerogative Court.*

17. *The manner of Administring an Oath to the Party Accounting upon the lesser Sums, by vertue of a Commission granted to remote parts.*

IF an Executor or an Administrator is called to give an account, at the instance of any Person having Interest in that behalf; or if it is Sued in a Cause of Legacy, and the Defendant in that case, doth alledge the insufficiency of the Goods; if the Executor or Administrator hath disbursed several Sums of Mony, which are under forty Shillings; these Sums are to be allowed upon the † Oath of † *Lin. de testamentis. c. statutum. Sect. Inventar. vero verb. reddere rationem. Joh. Athon. in glos. magna. ad c. libertate de execut. testamenti Swinb. parte 6. Sect. 20. n. i. verb. primo.* the Party Accounting, on this manner 'N. hath appeared personally, and without any intention of revoking his Proctor, hath made Oath, that he hath disbursed all and singular those lesser Sums, mentioned in the Account, not exceeding the Sum of forty Shillings; wherefore he hath desired that these Sums might be allowed, and that Right and Justice may be Administred and done him. Then the Judge (Administring an Oath to the Party Accounting, upon the truth of this Allegation, (*viz.*) that he hath disbursed these lesser Sums, and this Oath being taken by the said Party Accounting) he must say, 'We allow to the said N. the Party Accounting, all those lesser Sums, not exceeding the Sum of forty Shillings, so as he be not detected of deceit, or a fraudulent division. For sometimes the Party Accounting, knowing that all these lesser Sums, he wont to be allowed upon his sole Oath, is wont to divide the greater Sums into lesser, and particular Sums. And the aforesaid Oath being taken and admitted, and the decree of the Judge, intervening likewise, it makes full

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proof

proof as to these lesser Sums, (so as those Charges may be avoided, which the Party might otherways be put to, in the proof of payment, by Witnesses,) seeing it is presumed, that no Man will take a false Oath.

2. If in these cases about giving Accounts, any one having Interest to call an Executor or an Administrator to an Account, (to wit the Son of the Deceased, a Legatory a Creditor, and others, as afterward) do call the Executor or Administrator to exhibit a true, a full, and a perfect Inventory of those Goods of the Deceased, which have come to his hands, and to give a true Account upon his Administration of the said Goods, he ought to exhibit the said Inventory, and make the said Account personally and (if the Adverse Party request it of him) he ought to take his Oath of the truth of the same, notwithstanding that perhaps an Inventory was already exhibited, at the instance of the mere Office of the Judge, and in the absence of the Party, and that an Account were given by virtue of the Oath of the Party or his Proctor. And observe, that this Inventory is not to be exhibited under the Protestation of adding to the same (as is usual in Inventories that are exhibited by the Proctors in common form and not at the instance of a Party) but simply and directly for a full, a true, and a perfect Inventory of all and singular the Goods of the Deceased, which have come to the hands of the said Party accounting, since the Death of the Deceased. Therefore let the Parties Exhibiting these Inventories, and making these Accounts, take heed how they exhibit any Inventories which are false or untrue, and how they give an Account upon their Oaths. For if the matter is made otherways manifest and apparent, they not only commit Perjury, but may be proceeded against by the Ecclesiastical Judge, in a Cause of Perjury: And the Judge may punish them according to the Canons of the Church, if they are convicted of any omission of Goods, or not explaining any of the Sums, mentioned in the Account. And although it is said afterwards, that it is lawful for the Adverse Party, to reprove or object against this Inventory and Account, yet it may be enquired whether or no, the Adverse Party, who desires this Ex-

bition of the Inventory and Account, and the Oath of the Party Accounting, upon the truth of the same, may afterward (*viz.*) when the Party Accounting, doth take the Oath, upon the truth thereof (at his Petition) be admitted to object against this Inventory and Account: Because it should seem that this Objection ought to be propounded, before the aforesaid Oath is taken by the Party Accounting. For *quare*, whether or no, this Oath be a deciding the Sute, or it is a necessary Oath, as in other Causes, where the Plaintiff produceth the Defendant, upon the Positions of the Libel.

3. And although it was even now said, that the Executor or Administrator being cited, to give an Account, or to exhibit an Inventory, whether *ex officio*, or at the instance of a Party, ought personally to appear, and do all the premisses above specified: Yet if in case, by the Original Citatory Mandate, it doth not appear that the Party at whose instance he is Cited, hath Interest to Institute this Cause, the Defendant may appear by his Proctor, to the effect and form following. When the Proctor of the Plaintiff (having exhibited the aforesaid Citatory Mandate) hath accused the Contempt of the Defendant, who was cited to appear personally, to give an Account, or exhibit an Inventory; the Proctor of the Defendant may appear, and exhibit his Proxy in writing, for the aforesaid Defendant, and make his part for the same: And alledge that his Client is not obliged, nor compelled by Law, to exhibit an Inventory, and to give an Account, nor to satisfy the contents of the aforesaid Mandate, brought into Court at the instance of N. the Plaintiff, in as much as the said N. has no Interest in this Cause; at least, in as much as it doth not appear that he has Interest in the Cause. If the Plaintiff doth alledge his Interest to be such as is approved by Law in these cases, and doth prove the same, either by the answers of the Proctor or the Party, by Witnesses, the Defendant is not only obliged to satisfy the contents of the said Mandate, but is also to be condemned in Charges, which the Plaintiff has been at, the Proof of this his Interest: And if on the contrary, the Plaintiff makes default in the Proof of his Interest,

the Defendant is to be dismissed with Charges. But admit that the Interest of the Plaintiff is such, whereof the Defendant had no knowledge, at least, a probable knowledge (to wit, because the Plaintiff doth pretend himself a Creditor) until the same be proved; or if the Defendant, (so soon as he has proved this Interest, doth not propound any contrary or exceptive matter, against the Witnesses of the Plaintiff, or to frustrate his intention, as to this Interest; then the Defendant (seeing he had just cause of questioning such his Interest) is excused from Charges. But it is otherwise, if he propounds and makes default in proof of what he propounds. Yet the Proctors of the Plaintiff, are to be admonished in these cases of exhibiting Inventories, and giving Accounts, that (if in manner aforesaid, the Interest of their Clients, are denied, so as the Plaintiffs are compelled to prove the same) they take care, to get the Certificate of the Citation (which was taken forth, to call the Party to an Inventory and an Account) continued from one Court day unto another, until the Interest of the Plaintiff be proved; which being proved, they may cause the Defendant to be Excommunicate, if he doth not satisfy the Contents of the said Mandate. For the Executor or Administrator being called to exhibit an Inventory, and give an Account, ought to give the same personally upon his Oath. Therefore if the Certificate of the said Citation is discontinued, the Defendant cannot be Excommunicate, though he doth not satisfy the Contents of the said Mandate.

4. If a Legatary doth request an Executor to pay him his Legacy, left him by the Will; and the Executor (pretending that he has not Goods in his hands, which are sufficient to pay this Legacy,) doth refuse to pay the same. This Legatary may call the Executor to exhibit an Inventory, and give an Account; that so by inspecting the same the Legatary may be satisfied of the sufficiency, or insufficiency of the Goods of the Testator, to pay this Legacy. The Legatary also may compel this Executor, to prove and justify this Account by Witnesses. And observe, that in this case, the Party desiring an Account, is not to be condemned in Charges, if (the Account being exhibited

and inspected) he doth renounce the Sute, or doth not contend further, nor doth compel the Party Accounting, to prove and justifie his Account by Witnesses. But if this Party who desireth an Account, doth compel the Party Accounting to justifie his Account by Witnesses, (and Publication being made of those Witnesses produced upon the Account) the said Party doth give Objections against this Account, and faileth in the Proof of them, he is to be condemned in Charges, made by the Party Accounting. Also the Legatary, to whom the residue of the Goods is left, or any part of the residue, (that so it may appear to him, which and what Portion of the Goods is due to him) hath particular Interest, to call the Executor to give an Account. The like Interest also, hath he to whom the Deceased was Indebted, that he may know, whether or no the Deceased had Goods sufficient to pay this Debt: And if the Defendant in this case, doth deny the Plaintiff's Interest, and doth alledge, that he is not bound to satisfie the Contents of the said Citation, until this his Interest doth appear as above, then the Plaintiff ought to alledge and prove this Interest, before the Defendant can be compelled, to satisfie the Contents of the said Mandate.

5. If the Party who is called to give an Account, or an Inventory, doth deny the Interest of a Creditor, it must be Alledged and Propounded on this manner following. (Scil.) N. the Plaintiff or his Proctor, must Alledge (*ad omnem juris effectum*) that the Deceased (at the time of his Death, and whilst he Lived) was Indebted to the aforesaid N. in such a Sum: If this Allegation is denied by the Defendant, then it is to be Propounded joyntly and severally, and Right and Justice, and the Admittance of this Allegation, is instantly to be requested; which Allegation being admitted, in supply of the Proof, of the Contents of the said Allegation, the Bond or Letters Obligation taken for the said Debt, are to be Exhibited (adding these Words) that the Matters contained in the same, are true, and were had and done, as is contained in the same. Then this Allegation is to be admitted, and (if when these Letters are thus Exhibited) the Defendant doth deny, that they are true, the Witnesses are to be produced, to

prove the Sealing and Delivery of this Bond ; or if the Debts alledged are due by Merchants Books, or other Trademens Books, then the Book where that Debt alledged, is set down, ought to be Exhibited, and the Party Exhibiting the same, ought to alledge and prove, that this is the same Book, in which the Merchant, (or he whose Book it was,) was wont to write down the Names of Persons who were indebted to him : And this Proof is sufficient to prove the Interest alledged. But admit this Interest of the Plaintiff, cannot be proved, neither by Letters Obligatory, nor by a Merchants Book, yet the Plaintiff may be admitted, to prove his Debt by Witnesses. And it is to be noted, that in this case of proving the Interest of the Plaintiff (in order to ask an Inventory, and an Account) it is not requisite there should be such exact and full Proof, as in other Causes, wherein it is principally sued, in order to obtain the whole Cause instituted, (to wit) Tithes or a Legacy, for in these cases of proving the Interest of the Plaintiff, it is not sued principally for the Debt Alledged, but the Premises are Alledged incidently, only to prove, that the Plaintiff hath Interest, to call to an account. Therefore it is little inconvenience (nay it is rather an advantage) to the Executors, to make an Inventory and give an account, as is spoken afterwards. But without all dispute, those Persons to whom the Deceased was Indebted, may be very much relieved in this case, because by inspecting the Account, and the Proofs upon the same, it may appear evidently, whether the Executor or Administrator have fully Administred the Goods or not, which if they have fully Administred, it is to no purpose to commence Sute for these Debts. So also Legataries do often forbear to Sue for their Legacies, when they find by the Account, that the Executors have fully Administred the Goods in payment of the Debts of the Deceased.

6. To the aforesaid Persons, who are said to come in for their Interest, (to call Executors, &c. to account) may be added others. (*Scil.*) If any Legacy is left to a Minor, the Father, or next of Kindred to the Minor, by the name of Curator (being so appointed by the Judge, to the Use and behoof of the said Minor, may compel the Executors

Executor to Exhibit an Inventory, and give an account. Likewise the next of Kindred to the Deceased, (at least if they be poor) may call the Administrator (of any one, who dyes intestate) to Exhibit an Inventory, and give an account: That so soon as it appears to the Judge, what remains of the Goods, (the Debts being paid) there may be a distribution made, of some part of the same, amongst the next of Kin to the Deceased, at the pleasure of the Judge. Also if the Deceased in his last Will, hath not bequeathed the residue of his Goods to any body, nor hath any way disposed of the same, (although the Deceased has appointed Executors of that Will, and hath given the Executors, by reason of their care about the same, some particular Legacy.) For in this case, these Executors are said to be nude Executors, or Supervisors as it were, and the Judge may (as well of his own mere office, as at the instance of the poor Relations) call this Executor to give an account, and compel him to make a Distribution of the residue, to pious uses, or amongst the next of Kindred to the Deceased. And this has been anciently practised.

Concluditur ex his verbis quod executor tenetur de jure reddere rationem, utrum ab ordinario vel a parte requiritur. Swinb. par. 6. Sect. 20. n. 5. dicitur quod creditores & Legatarii sint vocandi, utrum judicis vel computantis officium respiciamus. Computum namque factum in absentia personarum earundem non prejudicet easd. Speculator de Inst. c. 2. dition. Sect. nunc vero aliqua. n. 45. Lind. de test. c. statutum. Sect. & postquam verb. ordinarios.

7. In every Citation † for an Account, or to Exhibit an Inventory, the Executor or Administrator, is wont to be called to appear personally, to give and Exhibit an Account, yea though he be called at the instance of a Party; therefore he is obliged to appear personally; at least it hath been so practised and observed, in the Prerogative Court, time out of mind: Yet a Proctor may appear for the Party Cited, to Alledge the Causes of the absence of the said Party, and the Causes why he is not obliged to give an account as above, at the third number; and he may Alledge his Infirmary, his Age, or the like causes, and that therefore he is not obliged to appear personally. But as was said before, if these Causes are not Alledged and Proved, the Parties called are obliged to appear in Person. The reason is, because that in these Causes, or Cases of giving Accounts, the Oath of the Party Accounting is required upon the truth of the same.

8. Now although the Executors and Administrators of

the Deceased, have laid out all the personal Estate, which the Deceased left, (at the time of his Death) in paying the Debts, the Funerals, and other necessary Charges, so as there remain no Goods in their hands, Unadministred: Yet the next of Kindred to the Deceased, as also the Legataries, and all other Persons, to whom the Deceased was Indebted, may severally, or in several Causes, compel these Executors and Administrators to give an account, by means whereof they may put them to infinite Charge. Therefore these Executors or Administrators, so soon as they are called by any of the aforesaid Persons, to give an account, (to avoid these Charges and Vexations) they may call one or other, of the next of Kindred to the Deceased in special, and all others whosoever in general, (who have or pretend to have any Right or Interest to the Goods of the Deceased, to appear in such a day and place, if they think themselves any way concerned) to see a true and perfect Inventory, of the Goods of the said Deceased Exhibited, and account made upon his full Administration of the said Goods; and also to see Witnesses, Produced, Admitted and Sworn in due form of Law, (upon the same) and their Sayings and Depositions published, and to proceed further in the same concern, (according as the Law, and the Nature of the Cause requires) even until the Definitive Sentence be Pronounced inclusively with an Intimation, as above. And it must be proceeded in this case, in the presence of the Parties appearing, if any do appear, and in penalty of the Contempt, of those who appear not; and all things are to be done, in like manner as is spoke of the manner of beginning, prosecuting, and ending Sute. And observe, that this method of proceeding is very necessary and useful, to the Executors and Administrators, not only (as is said before) to prevent diverse and manifold Actions, which might be commenced against them for Accounts, &c. but also lest these Executors and Administrators, should be called to render and justify an Account, when their Witnesses (who should prove and depose the payment of the Debts) are dead: Which Mr. Clarke says, he has often seen practised. Likewise if this Executor or Administrator, do

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prove their Account, and do obtain the Sentence of the Judge, that they have wholly, and fully Administred the Goods of the Deceased, and that there remain no Goods in their hands, which are Unadministred, their Executors and Administrators when they dye, are freed from giving an account of the Goods of the first Deceased. For it is to be noted, that these second Executors or Administrators, may be compelled to make an account, in the Goods of the first Deceased, if his Executors or Administrators have not already made an Account, nor justified the same. And in this case, these second Executors or Administrators, are not allowed to Swear as to the payment of those lesser Sums, as was spoke in the first number. For an Oath upon those lesser Sums, is not to be Administred to any, but to the Party, who disbursed them: And therefore the said Oath, is not to be granted to the second Executors or Administrators, but only to the first. Also the Proofs made, upon an Account, (given at the Instance of some one Party, who hath Interest) make no full Proof against another, or a third Person who hath Interest, at least if he were not called as above in special, or in general. Because things done amongst such Persons, hurt not those who are [†] absent. And altho' it is said above, that the Executors or Administrators may call all and singular, &c. as well in special as in general, to see an Account given, &c. And that these Executors and Administrators, are free from further giving Account, at the instance of any other Persons; yet this holds not where there are Minors who have Interest; because they (when they come to full Age,) are permitted to call these Executors or Administrators, to give an Account, notwithstanding the Premises; because these things thus done, do not any way prejudice the Minor.

9. If the Party accounting doth desire Debts to be allowed him in his Account, it is requisite that he prove two things: First the truth of the Debt. That is, that the Deceased in his Life time, and at the time of his Death, was indebted to those Persons mentioned in his Account. Secondly, That the said Party accounting hath fully and faithfully paid this Debt. Likewise, if in the said Account, there

[†] *Vide notata
in marg. ad. n.
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there is required an allowance of any Charges of Sute, expended in any Secular Court, for the recovery of the Deceased's Debts, or in Actions commenced against the Party Accounting, for any Debts, supposed to be owing by the Deceased: Or for any Charges expended in an Ecclesiastical Court, in proving the Will in Common form, or in Solemn form of Law, by Witnesses, or in Actions for Legacies, when there are not Goods sufficient in the Executors hands, to pay the same: Or in a Cause of Temerary Administration, against such as do Temerarily Administer the Deceased's Goods, and hinder the Executor, so as he cannot Administer the same. The Party Accounting in these cases ought to alledge and prove such Actions to be commenced and then specify particularly, and prove by Witnesses, or by his own Oath, (if the Sums requested to be allowed are lesser Sums, not exceeding Forty Shillings) what Charges he hath expended therein. And although it may be here Objected, that the Executor Instituted a just Cause in the Secular or the Ecclesiastical Courts, that (seeing he got the victory in those Sutes, and also his Charges of Sute he ought not to have those Charges placed in his Account allowed him. To this it may be replied, that oftentimes in these cases, the Parties in Sute, although they do obtain a victory in the Cause, yet they have not their full, (nay scarce half) their Charges and Disbursements allowed them. Therefore in these cases, an honest and just Accountant ought to specify the whole Charges of Sute in his Account and then he ought to confess what Sum was allowed him in the said Actions; and then desire an allowance for the residue of the Charges. But it is to be noted, that in certain cases above specified, (to wit) if the Executor shall be called to prove a Will by Witnesses, or to give an Account, and the Plaintiff in these cases, (Witnesses being produced upon the Will, and the Account being Exhibited doth renounce the Sute, or doth not further contend, the Executor shall not obtain full Charges: Therefore in the case even now mentioned, these Charges are to be allowed to the Accountant. And although it is said before, that the Party Accounting, ought to prove, not only the Debt, but also the Payment of the same; yet man

Our late Advocates are of Opinion, that to prove the truth of the Debt, it is sufficient to exhibit the Letters Obligatory, and the deposition of one Witness, upon the Seal and Delivery of the same: And also to prove the payment of the same, the Deposition or Oath of one credible Witness is sufficient, (*viz.*) that such a Debt, as is mentioned in the Inventory is true, and that the said Witnesses received the same, and then the Suppletory Oath of the Party in supply of the Proof. But as to the payment of Legacies mentioned in the Account, the Accountant ought to prove, that such Legacies as he requests, may be allowed, were left in the Deceased's Will: And the payment thereof, he may prove by two Witnesses, or one at the least (*viz.*) the Legatary himself, and the Suppletory Oath of the principal Party. But to prove that there were such Legacies left, if the Accountant do Exhibit the Probate of the Will, Sealed with the Seal of the Judge, who proved the same; And if the Proctor of the Plaintiff, or the Plaintiff himself, do confess that that Will was proved, or that the Seal was put to that Probate by the Judge, who is named therein, this is accounted and admitted as full and sufficient Proof, and the Accountant in this case, is not obliged to prove (the Legacies left) by Witnesses.

10. In the Account, the Executor or Administrator, ought first to charge themselves with the true value of the Goods of the Deceased, specified in the Inventory (for in the Inventories, the Executors are wont to insert, all the Rights, Credits, Goods and Cattle of the Deceased) then they ought to alledge and desire Allowances and Deductions to be made on this manner, (*viz.*) First, the Debts which the Deceased owed, are to be inserted, and if they be paid, this Accountant ought so to alledge. But if all the Debts are not paid, then he ought only to insert such as are paid, and then the Funeral Charges, and all other ordinary Charges whatsoever, and also those Charges which the Accountant hath necessarily expended, and is like to spend about proving the Deceased's Will, either in common or solemn form of Law, or about such Actions as are commenced, either by or against the Executor, by reason of his Executorship, (to wit) for the re-

recovery of Debts or Goods of the Deceased. And at the end of this Account, must be set down the total Sum of the Disbursements, or things to be allowed. That if it may appear (those things being allowed and deducted which ought by Law to be allowed and deducted) which and what Sum remains in the Accountants hands unadministred.

II. If there doth not remain Goods sufficient (in the Executors hands) to pay the Legacies mentioned in the Libel; then the Executor and Administrator (before the Cause is concluded) must alledge as follows. 'N. (to wit the Accountant or his Proctor) to all effects in the Law doth alledge that before this Cause was begun, his Client had fully administred, all and singular the Goods of the Deceased, and that at present there remains not, neither did (at the time of instituting this Cause) remain any Goods of the Deceased, in the hands of his Client, which were sufficient to pay the Legacy libelled, and sued for. This Allegation is to be propounded jointly and severally, and Right and Justice is to be desired: Which being admitted, a Term Probatory is to be given. And seeing this Allegation is so incertain and general, so as the Examiner cannot examin Witnesses upon the same, at least so as to make a conclusive Proof of the Intention of the Party propounding; therefore the Party propounding the Allegation, ought to specify and declare the said general Allegation, (within the term given for the Proof of it) in this manner. 'N. in order to specify the Allegation of full Administration, already given in by him, and with an intention to declare the same, doth exhibit a true, full and perfect Account upon his said Administration, in the Goods of the Deceased, and (*ad omnem juris effectum*,) doth alledge, that all and singular the matters and things contained in this Account, are true, &c. in manner and form as is specified in the said Account. And this Allegation is also to be propounded jointly and severally, and is to be admitted as above. Which being so admitted, the Party alledging, may easily, and without much Charges (at least as to the Examination of the Witnesses) produce his Witnesses, not upon the whole Account, but upon the

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12. At the tenth number, it was said, that the Executor or Administrator, ought in his Account to charge himself with the true value of the Goods of the Deceased, mentioned in the Inventory already by him exhibited before the Judge (who proved the Will wherein the Legacy sued for, is given.) Yet in a Court of Controversie, the Defendant (to discharge himself, that is, to prove that he hath fully administred the Goods of the Deceased) though he may have exhibited an Account, drawn in manner and form above specified, yet is he bound to justify or prove, what he hath charged himself with, in the said Account, (*viz.*) That such Goods, and no more came to his hands. Therefore he may exhibit a true Copy of the Inventory of the Deceased's Goods, (already exhibited by him, before the Judge, at the time of proving the Will) alledging as follows. 'N. in supply of the Proof, by him given in this Cause, hath exhibited a true Copy of the Inventory of the Deceased's Goods, and hath alledged that this Copy was and is subscribed, with the proper Hand writing of O. the Register of the said Judge; and that the said Register was and is an honest and lawful Notary Publick, and that he is Register and Keeper of the Registry, of the said Judge, and as such, is commonly accounted, reputed and taken: And that this Copy is faithfully extracted out of the afore-said Registry, and doth agree with the original Inventory, remaining in the said Registry; which said original Inventory, was exhibited in due time, before the said Judge. And this same Allegation is to be propounded, joyntly and severally, and is to be admitted as above. And seeing the Proctor of the Adverse Party, is better instructed, what and how to answer than his Client: Therefore the Proctor Alledging and Exhibiting, ought to Swear, that he hath faithfully propounded this Allegation, and may desire, that an answer may be given in Writing, (by the Proctor of the Adverse Party) to this Allegation and Inventory, upon the Oath of the said Proctor; which Oath, the said Proctor ought to take, as is requested. If the Proctor of the Adverse Party, doth confess or believe, that these Exhibits

hibits were subscribed by the Register, and that the said Register is an honest and lawful Notary Publick, although perhaps he denies or doth not believe the other things contained in the said Allegation; yet the intention of the Party propounding the aforesaid Allegation, is sufficient to found. For the other Contents are presumed to be true in respect of the Credit, which ought to be given to the said Register. But if the said Proctor being sworn to make a faithful answer, doth deny that Allegation and Inventory aforesaid, or doth upon his Oath, answer, That he doth not believe the said Copy exhibited, to be subscribed by the Register alledged, then this Subscription, and the truth of this Allegation must be proved, either by searching the Records of the said Registry, or by Witnesses who were present at the time of subscribing the said Copy of the Inventory, and the Act upon the Exhibition of the same, and the collation or comparing of the same, (made by the Register,) with the Originals remaining in the Registry. For it is to be noted, that if the Accomptant doth not prove by the Exhibition of the Inventory aforesaid, what, and which Goods of the Deceased, came to his hands (by reason of the Execution of the aforesaid Will,) he ought to prove by Witnesses, which, what, and how many Goods of the Deceased came to his hands; which thing is very hard to do. And in as much as he entred on the Deceased's Estate, immediately upon proving the Will, or administering the Goods, it is presumed that there came Goods of the Deceased, (to the Hands of the Executor) which were sufficient; or at least, it is presumed that he may make appear, what Goods came to his hands: Which presumption is taken away, if an Inventory were exhibited as above. And if it appear by inspecting the Inventory, that the Goods are not sufficient, to pay all the Legacies (those things being allowed and deducted, which are by Law to be allowed and deducted,) it lies upon the Plaintiff, to prove that more or other Goods came to the hands of the Executor.

13. Although the Accomptant is freed from proving the quantity and value of the Goods of the Deceased, by the sole Exhibition of the Inventory, in manner aforesaid; yet

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the Adversary in a Cause of Legacy, or in any other Cause (where the benefit of *Plenè administravit* is alledged,) may object against this Inventory and Account, (*viz.*) That there are several Goods, omitted out of the Inventory; and that there are some other Goods, which are not appraised and valued according to their real Value and Price. And in these Objections, the Goods omitted are to be specified, and the true value, not only of those Goods which are omitted, but also of any other Goods which are not appraised according to their worth.

14. Though Goods are not appraised, nor Inventories made of those Appraisements, according to the Ecclesiastical Laws, nor according to the form of the Statute of this Kingdom; yet it hath been observed by the style of these Courts (time out of mind) that if the Goods of the Deceased were appraised by some honest Persons, (who are Neighbours of the Deceased) and are put into an Inventory, and afterward the said Inventory is exhibited in due time, (upon the Oath of the principal Party, in due time before the Judge who proves the Will, or grants the Administration) that then it makes full Proof, in all Causes, and Courts, and the Party Exhibiting the same, is freed from proving the truth of the said Inventory, (to wit, that the Deceased had more Goods) and it lyes upon the Legatee, or any other Person, who pretends a right to the Deceased's Goods, to prove what Goods are omitted.

15. Upon what grounds or consideration Mr. *Clarke* inserts this here, I well know not; however, lest I should alter Mr. *Clarke's* Intention, in placing it any where else, I shall insert it, as it offers it self, here amongst these Accounts. If an Executor is called, (either of the Office of the Judge, or at the Instance of a Party) to prove any Will, which is already proved before a Judge, (in remote Parts) in common form of Law; or is called to accept or refuse the Execution of the Will, and this Executor doth defer to prove this Will in common form of Law. Or if any one who is next of Kindred to the Deceased, or if the Relict of the Deceased, (to whom the Administration of the Deceased's Goods might appertain if he died intestate) are called to accept or refuse the Administration of the Goods

Goods of the Deceased, or to shew cause why Administration of the Goods of the said Deceased, may not be granted to such an one (*Scil.* to some of a more remote degree, or to some Creditor.) Or if some Will is proved before a Judge in remote Parts, in such Case, where the Deceased (as the Plaintiff pretends) had Goods sufficient (out of the Diocess where he died) at the time of his Death, to found the Jurisdiction of the Prerogative Court of *Canterbury*, and the Executor is called to shew Cause, why the Probation of this Will, (being made before one who was no proper Judge,) may not be revoked and declared as null, and invalid. Likewise if an Administration of the Goods of any one Intestate, is granted before an Incompetent Judge in remote parts, (whereas the same ought to have been granted by the Judge of the Prerogative Court, as the Plaintiff pretends at least.) And this Administrator is called to shew Cause why the said Administration may not be revoked and retracted, as being granted by an Incompetent Judge: Or if he who obtains Letters of Administration (from the Judge of the Prerogative Court) of any one Deceased, doth call another Person (who hath also obtained Administration of the said Deceased's Goods to be granted him by an inferior Judge, to answer certain Articles, touching a Temerary Administration of the Goods of the Deceased, and in the like Cases, whereof the Judge of the Prerogative Court takes cognizance: In all these cases, if the Deceased (notwithstanding what the Plaintiff may pretend) hath not sufficient Goods to found the Jurisdiction of the Prerogative Court, a Proctor may appear for the Party Cited, under Protestation of not consenting to the Judge of the Prerogative Court, as a competent Judge in this Cause, on his part, and may alledge as follows, (*viz.*) That N. the Party Cited, is not bound to appear, nor to satisfy the Mandate brought in against him, in as much as the cognizance of this Cause, doth not appertain to this Court, seeing the Deceased died in such a Parish of the Diocess of N. and that he had not in his Life time, nor at his Death, Goods sufficient (or none at all) out of that Diocess, to found the Jurisdiction of this Court; and then the Plaintiff ought

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to alledge, and prove, as in the following number. For it is not presumed, that the Deceased had Goods out of that Diocese where he died, and by the Common Law, every Will ought to be proved, and every Administration ought to be granted before the Ordinary of the place; the Defendant therefore in this Case, hath the presumption of the Law on his side: In this case therefore, it lies on the part of the Plaintiff to prove the Jurisdiction of the Prerogative Court. And observe, that although it is said, the Defendant may alledge that the Deceased had not, at the time of his Death, Goods sufficient out of the Diocese, to found the Jurisdiction of the Prerogative Court, &c. Yet it may not be doubted, but that the Party who propounds this Allegation, ought to prove the same. Mr. *Clarke* believes it not safe, (to avoid the Questions in Law about this Matter) that the Defendant appearing in any of the aforesaid cases, under those Protestations, do only say, that he is not bound to satisfy the Contents of the said Mandate, so introduced, unless the Jurisdiction of this Court and of its Judge, do appear.

16. And if in any of the aforesaid cases, the Jurisdiction of the Prerogative Court is denied, and declined, then the Proctor of the Plaintiff ought to alledge and prove, that the Deceased died, in such a Diocese, or peculiar Jurisdiction, and that at the time of his Death, he had such and such Goods and Chattels out of that Diocese, amounting to such a sum, in such a Parish; and that that Parish is within such a Diocese, (*viz.* in another Diocese, or Jurisdiction, out of that Diocese where the Deceased died, and if the Defendant denies this, and the Plaintiff proves it, the Defendant is not only to be condemned in Charges which are made, and to be made about the proving the Jurisdiction, but also in presence of his Proctor,) the Adverse Party may desire, and the Judge may decree, according to the Contents of the aforesaid Mandate brought into Court, that the Defendant ought to satisfy that, which otherwise ought to have been done, if the Objection had not been proved against the Jurisdiction of the Court. Yet it is to be noted, that it is expedient for the Proctor, who denies the Jurisdiction of the Prerogative Court)

that he propound it *bona fide*, for otherwise, the Proctor so declining the Jurisdiction of the Prerogative Court, is Guilty of Perjury: Seeing that when he is admitted Proctor in the Arches he Swears that he will never do, nor procure any thing to be done, against the Priviledges, and Jurisdiction of Christ's Church in *Canterbury*.

17. If any who is aged or infirm, or any other privileged Person is called to appear personally to give an account; his Lawful Proctor upon that Day (against which he is cited to appear to give an account) in order to excuse him from any Contempt, may alledge some of the aforesaid Causes, why he is not bound to appear to give an account personally: And if his Adversary doth not deny these Alledgments, a Commission is to be granted to remove parts, in order to Swear the Accomptant, not only upon the whole account, but also upon every one of the lesser sums, under Forty Shillings, and a certain day and place is to be appointed for the dispatch of this Commission, and all things are to be dispatched and done, in the presence of the Adversary or his Proctor, or in Penalty of their Contempt as in other Commissions of this nature. But if the Adverse Party doth deny those things alledged by the Defendant, in order to excuse him from a personal appearance, then they are to be alledged and proved; and being proved, the Party denying these Alledgments, is to be condemned in Charges, and a Commission is to be granted, to the aforesaid effects. And if on the contrary, the Party alledging the same, doth make default in the proof thereof, then the Defendant is not only to be condemned in Charges, but is also to be Excommunicate, for not satisfying the Contents of the Mandate, brought into Court. Therefore let the Proctor of the Plaintiff, take care in this case, that the Certificate of the aforesaid Mandate, brought in as before, be continued until the next Court day; after the day assigned for the proof of those Alledgments made by the Defendant; for if the Certificate is discontinued, and the Defendant gives not an Account, he cannot be Excommunicate: Observe also that in the Act of Court, at the time of granting the said Commission, the Proctor of the Adversary is to be admonished to be present, at the time

dispatching

dispatching the Commission, if he thinks himself interested, and that if neither he nor his Client are so present, all things are valid, as done in penalty of their Contempt. Lastly, observe, that the proceeding upon this Commission, being transmitted, and the Party being Sworn as to the Truth of the Account, as well in general, as in special, upon the particular lesser sums; if it do appear to the Judge who grants this Commission, that all things were done in due order, and that the aforesaid lesser sums were not fraudulently, or deceitfully divided; then at the Petition of the Proctor of the said Accomptant, all these lesser sums are to be allowed, though this is not practised in these days, that is, the Commission being transmitted, the Petition (for an allowance of those lesser sums) for the Commissioners have not power to allow the Party these lesser sums, but only to Administer the Accomptant his Oath, upon the same: But it is convenient to consult the Advocates, whether or no it be convenient so to practise: (*Scil.*) the proceeding upon the Oath of the Accomptant being transmitted back to the Judge, whether or no the Proctor ought to desire the lesser sums to be allowed, or whether or no they are not allowed, by taking the aforesaid Oath, without the Judge his Decree.

C H A P. IV.

Of LEGACIES. *The whole order of suing for and recovering them.*

S E C T. I.

1. *A Legatary may sue in Cause of Legacy, against an Administrator of the Deceased's Goods, though no Will be proved.*
2. *All the Executors are to be called, in a Cause of subtraction of a Legacy.*
3. *Of a necessary Allegation, to be propounded by the Executor, to avoid his being condemned in the Legacy, if no Goods of the Deceased's remain in his hands besides Bonds or Bills, &c.*
4. *The benefit of Plene Administravit, may be pronounced and alledged, after Sentence is pronounced.*
5. *The Petition of the Executor, that the Legatary may give Bond to bear him harmless, upon the receipt of his Legacy.*
6. *Of the equal division of the Goods among the Legataries, if the Testator's Goods are not sufficient to pay the whole Legacies.*
7. *The manner of offering a Legacy.*
8. *Of a particular, special, and verbal Oblation or offering of a Legacy.*
9. *The Legatary (although the Executor doth offer the real value of the Legacies, as well before the Sentence is begun as also in Court) may refuse this oblation or offer without damage.*
10. *A third Person may come in, in this Cause.*

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Sometimes the Son or next of Kindred to the Deceased, knowing that the Deceased hath given many Legacies, by his Will, to avoid the payment of them, by suppressing the Will, procures an Administration of the Deceased's Goods, as though he died Intestate; by vertue whereof, he Administers the Deceased's Goods: but the Legatary in this case, may sue the Administrator in a Cause of Legacy, alledging that the Deceased made his Will, and appointed the said Administrator his Executor if it be so; if not, then this Clause is to be omitted: For it is sufficient to prove that the Testator gave such a Legacy; and that the Defendant got an Administration of the Deceased's Goods, granted to him; by vertue whereof, he invested himself in the Goods of the Deceased. These things being proved, though the Will were never exhibited, nor proved before any Judge in common form, yet the Defendant is to be condemned in the Legacy and in Charges, as in other ordinary Causes of subtraction of Legacies. Mr. Clarke says he has known this Cause of Legacy, Instituted, (Thirty Years ago) against the Temerary Administrator of the Goods of the Deceased, and the Plaintiff hath obtained his Cause, where he proved that the Legacy was left, and that the Defendant did Administer the Deceased's Goods. But consult the Learned in this case, and observe that a Temerary Administrator, is he who on his own Authority intermeddles with the Deceased's Goods without the Authority of the Judge.

2. If the Testator doth appoint many Executors, and they all do prove the Will, and the Legatary doth cite, or sue only one of them in a Cause of Legacy, that Executor, although to Purge his Contumacy, he ought to appear: yet upon the day of his appearance, he may alledge, that the Deceased appointed many Executors, and that they all proved the Will, and took upon them the Execution of the same, and that they are all of them alive, and that therefore, he is not obliged to answer in this Cause, nor to undertake the Sute, unless all the other Executors be also called: But this Allegation is to be propounded, before the Sute be contested, otherwise it cannot be admitted: Because the Defendant by contesting the Sute, doth take the

* *Myns. Inst.*
de Legat. Sect.
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Sute upon him, and doth renounce the benefit of Exception. But admit the Testator hath appointed three or more Executors, and that they all do prove the Will, and take upon them the Execution thereof, and two of them die: Yet the Legatary cannot Sue the Executors, or Administrators of these Executors, in a Cause of Legacy, but he must commence his Sute against the Surviving Executor. And if all the Executors do die * before any Sute is commenced, the Legatary ought to Sue the Executors, or Administrators of the Surviving Executor, or he who was last alive. The reason of this is, because the Law presumes, that the Goods of the Deceased, not Administred by the other Executors, must remain in the Power of the Surviving Executor; and if they remained not in his custody, and that it doth appear that the Surviving Executor could not commence an Action (before an Ecclesiastical Judge) against the Executors (of those other Executors, who are dead,) in a Cause of Temerary Administration, &c. or if there remains no Goods of the dead Executor in the hand of his Executor *in specie*, then these second Executors are to be called to give an account of the Goods of the first Testator's, which came to the hands of the Deceased Executor.

3. If an Executor (knowing that there are Goods of the Deceased, remaining in his custody, which are not sufficient to pay the Legacy Sued for; yet knowing that there are Debts owing to the Deceased, which are partly good or recoverable, and partly desperate) so soon as an Action is commenced for a Legacy, in order to avoid Sute and Charges, he may produce and Exhibit into Court (those Bonds or Bills † of such Debts) in this form. (*Scilicet*

† *Circa quantitatem hereditar. tempus mortis testatoris respicitur, nisi in nominibus hereditar. Myns. Inst. de Legator. Im. min. Sect. Quantitas autem per tot. & n. 3. verb. patrimonii.*

IN. that is, the principal Party or his Lawful Proctor with intent to avoid Sute, and unjust Vexation, and the future Charges, do really Exhibit certain Letters Obligatory specifying the Names of the Creditors: And I grant the Plaintiff, or his Proctor, all right of Action, in order to recover the said Debts: And I offer my self ready and prepared, to give sufficient security, that I have not released neither will release the said Debts: And I offer and deliver to the Plaintiff (if he be present, or to his use if he be absent)

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sent a Letter of Attorney made and granted in my Name, to Sue and recover these Debts, to the sole use and behoof of the said Legatary; and I also offer my self ready to give Security, that I will not for the future revoke these Letters of Attorney. And if the Plaintiff will not accept these Debts thus offered, but will go on in Sute, and in the end of the Sute, cannot prove any other Goods to be remaining in the Hands of the Executor; the Executor is to be absolved, and dismissed with Charges, which are made, from the day on which the aforesaid offer was made: And on the contrary the Legatary doth prove that other Goods (besides the Bonds offered) remain in the Executors hands sufficient to pay the Legacy Sued for, the Executor is to be condemned, not only in the Legacy asked (at least as to the Quantity of the Goods, which remain in his custody) but also in Charges of the whole Sute. But observe, that if the Bonds or Debts, offered by the Executor are recoverable, then the Executor ought to express and deduct out of the Goods of the Deceased (if they amount to so much) those Charges of Sute, which may be disbursed about the recovery of these Bonds or Debts, at the Common Law: But if there remains not Goods in the Executors hands, which are sufficient to bear the Charge of Sute, at the Common Law, in order to the recovery of these Debts or Bonds; the Executor is not obliged to Try Sute at Law about the same, at his own proper Charges: Yet at the time of offering the said Bonds or Bills (if they are accepted by the Legatary) it is expedient that the Executor do particularly protest, that there remain not Goods in his hands, which are sufficient to bear the Charge of a Common Law Sute.

4. If the Defendant who is Sued in a Cause of Legacy doth not in the whole proceedings, (before the Cause is concluded) alledge a *Plenè administravit*, (*viz.*) that there remain not Goods in his hands, which are sufficient to pay the Legacy Sued for, nor that it doth any way appear to him, that there are remaining in his hands, which are sufficient, &c. he may alledge this after Sentence is pronounced, to hinder the Execution of the same. Yet (if the Adversary require it,) the Party thus alledging is

to be condemned in Charges, of the first instance, for his negligence in not alledging it at the first, and is to be compelled to pay those Charges before he can be heard. Though this fails, if after the Sentence is pronounced, and before the same is put in Execution, the Executor is cast at the Common Law in a Debt which was unknown to him before the Sentence was pronounced: So that by reason of his being so cast, there do not remain Goods in his hands which are sufficient to pay the Legacy adjudged; in this case, the Executor may alledge this *Plenè Administravit* after Sentence, and if he proves such his Alledgment, he is not to be condemned in Charges of the first Sute, nor is he to be compelled to the payment thereof, before he is heard or admonished: Unless the Adverse Party can prove, that this Executor or Accomptant had knowledge of this Debt, before Sentence was pronounced. For then he is to blame, in not alledging it, before the Cause was concluded: And therefore it is convenient, that the said Accomptant do alledge in this Allegation, that he had notice of this Debt, only since the Cause was concluded; and by this he shall avoid the payment of Charges, until the end or event of the proof, of this Allegation, or the non-proving it. For if he proves it upon his Oath, he is not to be condemned in Charges, but if he makes default in the proof thereof, he is to be condemned in Charges, as well of the first, as of that instance.

5. If the Testator was in his life time bound for any one for some Debt, to become due some years after his Death, or for the performance of any Bargains, or Contracts afterward; though the Executor in this case hath Goods in his hands, which are sufficient for the payment of Legacies; yet if the said sum, for which the Testator was Bound (as above) is not paid; or if the said Contracts are not fulfilled or performed, so that the Creditor may have an Action at the Common Law, against the said Executor, for the aforesaid Debt, or for not performing the said Conditions or Contracts aforesaid: In this case, the Executor for his Security, may offer the Legacy Sued for into Court, under the condition, that the Legatary shall first give good Security to bear the Executor harmless, as to the Debt, and

and Conditions aforesaid: * At least for such a part or * *Lege falcidia*
 portion of the Legacy Sued for, and adjudged, having *cavetur ut pars*
 respect to, and a just Computation of the other Legacies. *quarta bonorum*
 And in this case, if the Legatary do deny the Premises, *penes Executo-*
res remaneat.
Scil.) that there are no such Bonds, &c. The Executor *Ratio hujus.*
 ought to Exhibit these Assignments and Indentures: And if *innuitur a Myn.*
 the Legatary doth deny them, he ought to prove the Seal. *Inst. Tit. Lega-*
tor. immin. n.
 ing and Delivery of them by Witnesses: Which being *7. 13. in text.*
 proved, if the Legatary doth refuse to give Security, to
 the Effects aforesaid, the Judge is not wont to compel the
 Executor to the payment of the Legacy, but the Execu-
 tor may deposite the aforesaid Legacy, into the Hands of
 the Register under the aforesaid Condition. But Mr.
 Clarke says, he has known it practised in this case, that
 it is sufficient, that the Executor do only alledge the Debts
 and Conditions aforesaid, and Exhibit the Instruments
 drawn thereupon into Court, upon his own Oath, touch-
 ing the Truth of the same, because that in these Cases, a
 full and exact Proof is not required.

6. The Debts and Funeral Expences of the Deceased,
 and other Ordinary Charges being paid, † if the Deceased † *Myn. Inst. T.*
 has not Goods sufficient to pay the whole Legacies an e- *Legat. immi-*
nutio. Sect. cum
 qual rate and proportion * is to be made to every Legatary, *autem. n. 1, 2.*
 according to the quantity of his Legacy. Yet two things
 are here to be noted: First, that if the Deceased's Goods * *Myns. ibidem.*
 are sufficient to pay all the Legacies that are left in this *n. 5.*
 Will *in specie*, but not all the Legacies that are left in *genere*,
 when all those Legacies *in specie*, are to be paid, no deducti-

on being made, in respect of those Le-
 gacies in *genere*. † Secondly, That if the
 estate be commenced by one Legatary (to
 whom perhaps, a considerable Legacy
 is left in general) against the Executor,
 and the Executor is condemned by the
 sentence of a competent Judge, to the
 payment of this Legacy, before the
 other Legataries, (who have Legacies
 left them in general also) do com-
 mence any Sute, or make request for

† *Genus jure nostro varias habet ac-*
ceptiones. Zofius in suis intell. mox.
a princ. distinguitur in summum, ut
substantia; subalternum, ut Animal;
infimum, ut servus, bos, &c. hoc est
quod a Dialecticis vocatur species in-
ferior, & hoc infimum triplici dif-
ferentia recipitur. Myns. ubi supra.
de Legat. Sect. si generaliter. n. 1, 2,
3, 4, 5. etiam apud. ff. tit. de optione
& elect. Legati, ubi reperias diffe-
rentiam inter legatum in genere, &
in specie.

their Legacies; if afterward, these other general Legata-

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ries, do commence Sute for their Legacies, and (the said considerable general Legacy now spoke of being paid) there are no other Goods remaining, to pay these other Legacies *in genere*, the Executor is not to be compelled to pay these other Legacies *in genere*, nor to make the aforesaid equal division, but shall be freed, by the benefit of his *Plene Administravit*, and the Sentence of the Judge; but *quare*.

7. An Oblation or Offer may be made of a Legacy in like manner as of Tithes. For Example, if the Sum of a Hundred Pound is bequeathed, and the Executor has only the Sum of Ten Pounds of the Deceased's Goods remaining in his Hands, which he really offers in Court with the Charges: If this offer is refused, the Plaintiff (not proving a greater Sum) is to be condemned in Charges which are made in the Sute, since the Day of such refusal, the Defendant is to pay what Charges were before; and so on the contrary, if the Plaintiff do prove a greater Sum.

8. If a Legatary, (to whom Household-Goods, Sheep, Oxen, Cows or Horses, or any other Legacy not portable (which are called Chattels) is left) sueth an Executor, for these Legacies *in specie*, and the Executor doth intend to pay these Legacies *in specie*, and not to offer the Price, or value of them; lest it should be disputed betwixt the Legatary and the Executor, touching the real Value of these Legacies; this offer is to be made on this manner. N. having an intention to avoid Sute, and prevent an unjust Vexation and future Charges, do offer my self ready to deliver to the Plaintiff such Legacies, (*viz.*) those which the Sute is commenced, &c.) in the House where in they remained, at the time of the Testator's Death: (if they are removed thence) in some other indifferent place, to be assigned by the Judge, upon any day so appointed also at the pleasure of the Judge: And I offer my self ready, and prepared to pay all such Charges as are due, or to be taxed by the Judge. And whether the offer be accepted or refused, you must proceed in like manner, as in the offer of Tithes, of which afterwards. This only excepted, that in this case of Legacy a ver-

offer before the Sute is moved is sufficient, because these Legacies cannot be really offered in Court; but in Tithes, the Offer is judicial before the Libel.

9. If the Deceased doth bequeath to his Son, some Household Goods, or such a Horse or a Gold Ring, (which has his Father's Signet upon it) and perhaps which the Deceased intends to leave his Son as an Heir-loom, and desires he may have it *in specie*, in this Case, he may refuse the Value of it, offered by the Executor, and may insist to have the thing *in specie*, (at least if it is in being) and if the Executor doth persist in the Sute he is to be compelled to restore the same *in specie*, and is to be condemned in Charges, although he have offered the real Value of it. And observe that in every Sentence to be pronounced in this Case, the Judge is wont to condemn the Party to pay the Legacies *in specie*, if they are extant, otherways, the true Value of them. And so also he who Sues for Tithes, may if he will, refuse the Sum offered, and insist for the Tithes *in specie*, and so in every Sentence to be pronounced in such a Cause, the Judge is wont to condemn the Party (subtracting the Tithes) in the Tithes if they are extant, or otherwise in their real Value, &c.

10. In this Cause also, a third Person may come in for his Interest, like as in a Matrimonial Cause, where at the Eighteenth Number, it is already shewn.

CHAP. V.

• Of TITHES. *The whole order of Suing for, and Recovering them.*

SECT. I.

1. *What and how manifold, Tithes are said to be.*
2. *The order of getting a Monition against the Parishioners, to pay Tithes, under Penalty of Suspension from entering the Church, and of Excommunication.*
3. *The manner of Executing, and Certifying this Monition.*
4. *The Petition of the Proctor, after the aforesaid Monition is returned, if the said Parishioners, do not pay Tithes, tho' admonished.*
5. *The manner of proceeding, if the Parishioners (being cited) do not appear.*
6. *The manner of proceeding in the aforesaid case, if the said Parishioners (being so cited) do appear.*
7. *The Customs (touching the manner and form of Tithing, and the Immunities of the Church, for not paying Tithes) may be alledged before the Ecclesiastical Judge.*
8. *The manner of offering a Sum in the name of the Tithes, to avoid Sutes.*
9. *The manner of accepting the offer in full Payment, and of condemning the Defendant in Charges.*
10. *The Plaintiff may refuse a general Offer (for Tithes that are due) made before the Libel is given.*
11. *In what case the Party offering the Tithes, is not to be condemned in Charges.*
12. *The manner of condemning both the Defendant (who offers the Tithes after the Libel is given) in Charges, and also the Plaintiff refusing to accept the Sum, in full Payment.*
13. *Another sort of refusal to accept the Offer (in satisfaction of all the Tithes) made before the Libel was given.*

14. In what case it is convenient, for the Defendant to specify, for what Tithes it is, that he makes the offer.
15. If there are particular Offers made of the Tithes, the Plaintiff may receive one of them, and Sue for the rest.
16. Of another Offer of Tithes, to avoid the Penalty of the Statute.
17. The manner of restitution, or restoring the Plaintiff to his Term Probatory (in a Cause of Tithes) if it be elapsed.
18. The manner of requesting the fruits of a Benefice whilst a Sute is in dependance, touching the Title of the Benefice, or the right of Tithes.
19. The manner of putting Sentence in Execution, in a Cause of Tithes, as to the Charges, tho' it be Appealed from the Sentence, and tho' the Judge be Inhibited.
20. In what cases it is Lawful to Appeal from the Execution of the Sentence, as to the Taxation of the Charges, in Causes of Tithes, notwithstanding the Statute of K. Henry the Eighth.

† Johannes Calvin. in Lex. juris. monet. tract. de decim. c. 2. n. 4.

* Henricus Canis. tract. de decim. c. 1. Rebuff. tract. de decim. q. 4.

† De hisce omnibus plenius reperias apud Rebuff. tract. de decimis, quest. 3. n. 26. Zoef. in comment. ad jus canonicum tit. de decimis, c. 1. n. 6. in fin.

Besoldus. thes. pr. voc. Jehen. S. Lind. de consuet. c. statutum verb. Decimarum personalium. nullus verb. fructus.

THe word *Decime*, or Tithes, is variously taken in the Law † in short they may be defined a certain part, of all such things as are Lawfully acquired; and is due to the Church by Law, or Custom. * Tithes are also divided into Personal [*Scil.* such as any one pays for his Profession, Office, Industry, the tenth part of the Profits whereof, was formerly due to the Church] they are also Preial or Real, [*Scil.* such as are received out of the thing, Fruits or Profits] and these are divided into *major*, or *minor*, greater, and lesser Tithes. They are also divided into *Nouales*; that is, such are received of the Fruit of Lands, never tilled before; of which sort is the Tithes of Corn growing upon our barren heath Ground. †

2. First a Monition is to be requested, in the name of a competent Judge, (*viz.*) of the Arches, the Audience, or in the name of the Bishop, or his Official (but *quare* whether or no this hold as to the Inferior Judges) pre-emptorily to admonish all and singular the Parishioners, that they pay (or cause to be paid) to N. the Rector or Vicar of M. [all their Tithes under penalty of Suspen-

* *L. de decim.
c. quia quidam.
Sess. presentis
verb. Involvi
videtur ex Ca-
none Sententia
potius ferenda
quam lata, nisi
consuetudo ha-
bet tales pro
Excommunico-
tis.*

sion, from entering the Church of the major Excommuni-
cation to be pronounced against such as do not pay their
Tithes, after a Canonical and Lawful Monition. In the
old Monitions used in these Cases, instead of these Words
(to be pronounced, and promulged) they used these words
(in penalty of the Sentence of Excommunication, which
is *ipso facto* pronounced and promulged.) But *quare* why
they are now omitted. * But mention is to be made in
this Monition, that *N.* is Rector or Vicar, and that the
Parishioners do refuse to pay their Tithes; if all of them
refuse to pay their Tithes, then because they cannot all of
them conveniently be personally admonished, a Monition
is to be granted *viis & modis*, which may be publicly
denounced on the Lord's Day in time of Divine Service
in the said Parish Church. But if any particular Persons
do refuse, seeing they may be easily convened, then a per-
sonal or ordinary Monition is to be decreed.

3. If the aforesaid Monition be general, (as above)
and a Monition *viis & modis*, the same is then to be pub-
lished in the Church. And if the Parishioners, notwith-
standing this Monition do refuse to pay their Tithes, it is
to be certified upon what Day, and by whom it was pub-
lished. But if the same is against some particular Persons
of the Parish, then the same is to be Executed and Certi-
fied, like to an original Citation.

4. This Monition being returned, the Proctor of the
Plaintiff must Exhibit his Proxy for *N.* the Plaintiff, and
alledge, that his Client is the Rector or Vicar of the Pa-
rish Church of *M.* and as such is commonly reputed and
taken; and that in right of his Church, he ought to receive
all the Tithes and Ecclesiastical Rites whatever, growing
and arising within the said Parish: And that notwithstand-
ing the Premises, such Persons (naming those who were
Admonished) have refused and do yet unjustly refuse to
pay their Tithes. And that they have been by your Au-
thority (speaking to the Judge) Admonished Lawfully
and Peremptorily Admonished to pay these Tithes, to the
said *N.* the Rector or Vicar, under penalty of Excommu-
nication, to be pronounced against them; (or rather un-
der Penalty of their being declared to have incurred the

Sentence

Sentence of Excommunication, already pronounced by Law) as appears by the said Mandate, and the Certificate thereupon: And that notwithstanding this Monition, they yet expressly refuse to pay their Tithes, to the said Rector; not fearing to incur the Penalties pronounced against such, as do not pay their Tithes after a Canonical Monition. Wherefore he must desire that they may be cited to appear on such a day, and in such a place, and see themselves Excommunicate, for not paying their Tithes, to the said Rector, and for not obeying the aforesaid Monition; or rather, to hear and see themselves pronounced and declared to be such, as have incurred the Sentence of Excommunication already pronounced by Law: Which Petition the Judge decrees. In former times, it was wont to be practised on this manner, in this case, (*Scil.*) the Parishioners being Admonished to pay their Tithes in manner and form aforesaid, and yet refusing to pay them upon a return of the Monition, a Certificate being made upon it, and the Rector being Sworn, that such of the Parishioners were Admonished to pay these Tithes, but have not paid them) the Judge was wont to pronounce those Persons so Admonished, to be contumacious, and to have incurred the Sentence of Excommunication pronounced by Law against such as refuse to pay their Tithes, after a Canonical Monition: Neither was the Citation taken out before this pronounciation, as was said above. But at this day it is practised, as in the following number, (but very rarely) which late Practice, whether or no it be more consistent to the Law, than the ancient, is to be enquired.

5. Now the Citation above spoke of, being Authentically Certified: If the Parties Cited do not appear; at this day (though they were cited to the particular effect mentioned in the foregoing number, yet) they are to be Excommunicate for their Contempt, for not appearing; and are not to be pronounced to have incurred the Sentence of Excommunication aforesaid, (but *quare*;) therefore to avoid all Dispute upon this account, it is convenient to insert an Intimation in the said Citation, (*Scil.*) that if being Admonished, they do not pay their Tithes or if (being cited to the effect aforesaid) they do not appear,

appear and alledge sufficient Causes why they do not pay these Tithes; the Judge doth intend to pronounce them to have incurred the said Sentence of Excommunication and that they are to be denounced as Excommunicate. And then (this Citation with this Intimation, being returned and Authentically Certified, and the Contempt of the Parties thus cited, and intimated, accused in Form of Law, and they not appearing nor alledging any Cause, as above they are to be pronounced to have incurred the said Sentence of Excommunication, and are to be denounced as such, and if they persist in that State, they are to be signified and kept in Prison, until they satisfy their Contempt not only to the Church, but also pay the Rector, as well the Tithes they have detained, as also the Charges of Sute, and of their Contempt.

6. Now if the Parishioners, (thus cited to shew Cause why they may not be pronounced to have incurred the Sentence of Excommunication, for not paying Tithes according to the Monition Executed in that behalf) do appear and alledge, that they are not bound to pay Tithes to the Plaintiff until it doth appear that he hath Interest to receive those Tithes mentioned in the Monition, and Citation aforesaid; then the Plaintiff ought to alledge and prove his Interest. (*Scil.*) If he be Rector, he ought to alledge that he was Canonically Admitted, Instituted and Inducted, (so many Years ago) to the said Church, and that he is in peaceable possession of the same, and serves the Cure of Souls there, as well in the Administration of the Sacraments, as in Celebrating the Divine Service; and that he doth personally reside there, and is commonly accounted, reputed and taken for and as, the lawful Rector and Canonical Possessor of the said Church. If the Parishioners who are Defendants do confess these Allegements the Interest of the Rector is sufficiently founded; for then it necessarily follows that all the Tithes of the said Parish are presumed in Law, to belong to him: But if they deny the matters thus alledged by the Plaintiff, they are easily proved by Exhibiting the Letters of Institution and Induction of the said Rector. But he ought to prove his Induction by the Defendants Confessions, or else by Wit-
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ses: Because the Mandate to induct, proves not the real Induction. But if a Vicar sue in this Cause, and his right or interest is denied by the Defendants who are convened as above, he ought not only to prove his Institution and Induction, (in like manner as was said of the Rector) but also that he hath (either by a Composition and Foundation of his Vicarage, or by a lawful Prescription) the right of receiving the Tithes, which he sues for: Because a Vicar hath not the aforesaid presumption of the Law on his side. But if the Defendants do not deny, but confess the Interest of the Plaintiff, (that is, that he is Rector or Vicar) but do deny that they have substracted those Tithes, having perhaps paid them, or compounded for them: Then the Plaintiff must alledge and prove, that the Defendants had such Tithes at such a time within the said Parish, which they substracted, notwithstanding the aforesaid Monition: And he must also alledge, that the said Defendants have incurred the Sentence of Excommunication (by reason of the Premises) to be pronounced, (or rather which is already pronounced and promulged) against such as refuse to pay Tithes, after a Lawful and Canonical Monition: And in the conclusion of this Petition or Allegation, he must desire that Right and Justice may be done, and that the said Defendants, may be pronounced to have incurred the Sentence of Excommunication aforesaid, and that they may be denounced as such: Which Allegation being admitted, if the Defendants being produced, do confess upon their Oaths, or otherwise that they had, and received certain Tithes within the said Parish, and if they do not alledge and prove the payment of the said Tithes, or some other Exception, and sufficient Cause of Non-payment, the Judge may proceed upon the Plaintiffs Petition, to pronounce his Sentence, by word of Mouth, or Writing, (*viz.*) he may pronounce the Defendants to have incurred the Sentence of Excommunication, pronounced by Law in this case (against such as refuse to pay Tithes, when due, notwithstanding a Canonical Monition,) and that they are to be denounced as such. The Defendants are also to be condemned in Charges of Sute, neither are they to be absolved from this Sentence of Excommunication,

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cation, until they either pay or compound with the Plaintiff, for those Tithes so deducted, and withheld from him, and do satisfy the Church for their Contempt. But here are two things to be noted: First, That although it be proved by the confession of the Defendants, or by Witnesses that the Plaintiff is Vicar of the Church, and that the Defendants have Tithes becoming due, within the same Parish. If notwithstanding this the Defendants do deny, that these Tithes do belong to the Vicar: The Vicar as is said above ought to prove his right to these Tithes, (because he has not the presumption of the Law on his side) or otherwise he must lose his Cause. Secondly, Admit that the Defendants in these cases, being denounced Excommunicate do desire to be absolved from this Sentence, and to be restored to the Sacraments, and to the Communion of the Faithful, and are ready to pay the Tithes which they withheld, or the true value of them, (if the Tithes are not tant *in specie*), and to satisfy the Church for this their Contempt; and yet the Rector desires more, (as well as the quantity, as also the real value) than is due for the same, and therefore doth refuse to receive the sum offered. The Defendants in this case may go to the Judge, who pronounced the aforesaid Sentence, and (at their peril) deposite the real value of all such Tithes as were due, and desire the Judge to decree the said Rector to be called, to receive the said Sum offered, and to shew cause, why the said Defendants may not be absolved from the said Sentence of Excommunication, and be restored to the Sacraments of the Church, and the Society of the Faithful. If the Rector appears not, upon the return of this Citation (those things being observed, which the Law requires in that behalf,) the Defendant is to be absolved in penalty of the Plaintiff's Contempt: Oath being first made, of obeying the Law, and standing to the Mandates of the Church, and his Contumacy Fees being paid; but not in charge of Sute: Because those are first to be Taxed, and the Party to be admonished to pay the same. If the Plaintiff doth appear, and doth refuse to accept the Sum offered in full payment; then the said Sum, with the Charges which are due by Law, and are to be Taxed by the Judge

is to be deposited at the Act of Court, as in other Causes of Subtraction of Tithes; and the Plaintiff ought to alledge, specific and prove, which and what Tithes the Defendant has subtracted, and the value of them: And if he proves a greater Sum, than that which is offered, then he shall obtain the same with new Charges. But if he doth not prove a greater Sum, then he is to be condemned in those Charges, which are made by the Defendant, whilst this Sute depended, betwixt the Rector and his Parishioners, touching the quantity and value of the Tithes; and the Parishioners are to be released, from the said Sentence of Excommunication; because it is not disputed, as to right of Tithing or the right of the Church, but only touching the private right of the Rector, (*viz.*) touching the value and quantity; which belong to the sole private advantage of the Rector.

7. If in the Parish where the Defendant hath Tithe, there has been a Custom used, time out of mind, or for forty years together, at the least, as to the manner of Tithing: That is, that the Tithe of all Grain, is to be paid by the Sheaf, and that the Parishioners are not obliged to break these Sheafs into Shocks or Stacks; this custom being alledged and proved, the Defendant shall obtain the same. Likewise touching the Tithe of Hay; if the tenth part (uncut down) is set out according to the custom of the Parish, in lieu of Tithe-hay, and none is paid in the Shock, this custom shall also avail, if fully proved. Likewise if there is a certain Sum of Money usually paid, in lieu of Tithes, and not the tenth part of the Corn or Hay, *in specie*: The Defendant shall also prevail, if he doth sufficiently prove the Customs or compositions aforesaid. The same may be said of all other Customs: though less is paid by the Custom, than the tenth part of the Tithes are worth. As to the Immunities and Exemptions, or Priviledges, of paying Tithes, may be alledged by any Persons, and shall be wont to be alledged before the Ecclesiastical Judge, such as have Lands so exempt) who ought to admit of these Allegations: And if they are proved, he ought to pronounce for the validity of the said Priviledges, and discharge the Defendant from the Petition of the Plaintiff (as to those

those things sued for in his Libel) with his Charges. But what Persons and Lands they are, which are exonerated, and exempt from Tithes, mention is made of them, in a Statute made 31 *Hen.* 8. Chap. 13. Also real compositions, (that is, such as are made betwixt a Rector, and the Parishioners, that is, with the consent of such as have Interest) or as it sometimes falls out, betwixt a Rector and some Lord of a Mannor, for him and his Heirs to pay no Tithe at all, (but only a certain and a determinate Sum in lieu of them,) may be alledged before an Ecclesiastical Judge.

8. If any one is cited to answer in a Cause of Tithes, and has a mind to avoid being condemned in them, he must make an offer of the real value of them, at the beginning of the Sute, before the Libel is given in, or at least before the Sute is contested. And that he must do to this effect. (*Scilicet*) He must exhibit his Proxy for *N.* the Party cited, and make his part for the same; and declare, that out of an intent to avoid Sute, and to prevent an unjust Vexation and Charges, he must offer in Court to *M.* the Proctor of the Plaintiff, such a Sum, for all and singular the Tithes due (the said Plaintiff,) from his said Client, or which are to be paid by the Law or the Custom of the Parish of *O.* together with the Charges which are due and to be taxed upon his said Client. If the Proctor of the Plaintiff, doth desire a time to deliberate of this, and consult with his Client, whether or no he will receive this Sum thus offered, in full payment, or in part, time is so to be given him, until the next Court day or longer, as the Judge sees fit. In which Case the Sum offered, is to be deposited at the Court into the custody of the Register, lest it should afterwards be objected, that this offer was only verbal, and not made in Court. And observe, that this depositing at the Act of Court, has (for a long time, by the custom of all these Courts,) the same power and effect, as if this Sum had been Sealed in a Bond; and as if all other Solemnities, required to be done by Law, in these offers had been observed and performed.

9. If the Plaintiff, (either upon the time of this offer, or on the day which is given to consider of it, &c.) accept the Sum offered, in full payment, then he

desire that the Party making this offer, may be condemned in Charges : Which the Judge accordingly doth. Then a Schedule of Charges being given, the Judge doth Tax these Charges, and decrees a Monition for the payment of them, as in other cases.

10. Although the Defendant (being called to answer in a Cause of Substraction of Tithes, having an intent to avoid Sute and Charges for the future) doth offer a certain Sum, (before the Libel is given) for all the Tithes that are due, together with the Charges, and if the Plaintiff, upon that day assigned to deliberate of this offer, do refuse to receive the same in full satisfaction, and doth give a Libel, containing certain Tithes, extending to the value of the Sum offered, and doth proceed in the Sute, but doth not prove any more Tithes due to him, than those, he shall obtain Sentence for the Tithes, mentioned in the Libel, or the value thereof, and also the charges of Sute, notwithstanding the general offer, for all the Tithes, or for the whole thing due. For if there are *diverse species* of Tithes due, (*Scil.*) Corn, Hay, Lambs, and the like, the Plaintiff may commence an Action, for the value of any of these species; and when he hath Instituted the said Action he is not obliged to free the Defendant from all the other Actions. Therefore to avoid this Cautele and Condemnation, so soon as the Plaintiff doth give in his Libel, it is very convenient that the Defendant do offer particularly, *de novo*; that is, such a Sum for such a Tithe, and such a Sum for such a Tithe, or else offer the Sum offered at the first, (if it extends to the value of the Tithes, mentioned in the Libel) or at least another Sum with Charges, for the Tithes mentioned in the Libel : And then if this offer is either accepted or refused, the Defendant is either to be condemned in, or absolved from the Charges, as is shown afterward. But yet in some Years past, some Advocates were of a contrary opinion (so it was usually adjudged) being induced thereto by these Reasons, (*viz.*) if the Defendant, before the Libel was offered, having a mind to avoid Sutes, and prevent unjust Vexations and Charges, doth offer a certain Sum, in the name of all the Tithes that are due, with Charges as before, and the Plaintiff takes a time

to deliberate and consider of this offer, and whether he will receive this Sum, in full satisfaction or not : If on the same day, he doth so refuse to receive the same, and doth afterward give a Libel, and proceed in the Sute, endeavouring to prove a greater Sum due to him, than the Sum offered, and if he doth not prove more Tithes due to him, nor a greater Sum in the Name of Tithes, than the afore-
said Sum first offered, but doth proceed in the Sute, until Sentence be pronounced : In this case, the Plaintiff although he recover only the Sum offered, and his Charges of Sute, before the day of the offer ; yet he is not to be condemned in Charges of the whole Sute, from the day of the afore-
said offer. And it is to be noted, that by the ancient custom of the afore-
said Courts, an offer of the Tithes being made, (although general) the Plaintiff was wont either to receive the same in full satisfaction of all the Tithes or else refuse so to receive them. But if the Plaintiff do refuse the same, and doth give a Libel, and prosecute the Sute, and doth not prove a greater Sum due to him, this renders him of ill account, and he is therefore to be condemned in Charges, from the day of the offer, &c.

11. If the Sum offered, is received in full satisfaction and the Party offering the same is desired by the other Party to be condemned in Charges ; and if the said Party offering, doth alledge and prove, (the Adversary denying it) that he offered the said Sum, before the Sute was begun, from the time of executing the Citation, (at least before the day of the return thereof, and of the appearance of the Defendant,) and that the Plaintiff refused the Sum offered, or unjustly refused to receive the same ; then the Party offering, is to be absolved from, and the Party refusing, is to be condemned in Charges made about the proof of this offer. But observe, that in this case (to prove that the Sum was offered and refused, before the Sute was begun, and again upon the day of the Defendant's appearance) is not sufficient to excuse the Party making this offer, from the payment of all Charges ; because the Execution of the Citation, it is intended and presumed that the Plaintiff doth now propose otherwise, and doth (by the executing the Citation,) require the Sum offered.

And the Plaintiff at his House Minister notice of before the Defendant may be present and Proceed Citation. rated, for malice and

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after the summarily the Plaintiff then the Sute the Definition to be condemned this offer, because the not receive Defendant's counterlocutory refuseth to receive proceed and greater Sum condemned Defendant, since above,) is to be in the Sute, the Fee of the

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And therefore, if there is not another tender made to the Plaintiff himself, (if he can be met with,) or otherwise at his House, before Witnesses, or before an Ecclesiastical Minister, so as in all probability, the Plaintiff may have notice of the offer at the time of executing the Citation, or before the day of the Defendant's appearance, the said Defendant is in default, and is thereby injured. For if the Defendant had offered this Sum in manner aforesaid, it may be presumed the Plaintiff had not feed his Advocate and Proctor, nor had paid Fees about the certifying this Citation. Yet in this case, the Charges are to be moderated, seeing the Plaintiff seems to be guilty of some malice and prejudice.

12. If an offer is made after Sute is contested, or rather after the Judge hath decreed that it shall be proceeded summarily and plainly, for all the Tithes Libellate, and the Plaintiff hath received the said offer in full satisfaction; then the Sum offered is to be adjudged to the Plaintiff, by the Definitive Sentence of the Judge, and the Defendant is to be condemned in such Charges, as were made before this offer, together with the Fee of the Definitive Sentence; because the Plaintiff (Sute being contested as above) could not receive the Sum offered, nor could he have the Defendant condemned in Charges, but by the Sentence or Interlocutory decree of the Judge. But if the Plaintiff refuseth to receive this offer, in full payment, and doth proceed and persist in the Sute, endeavouring to prove a greater Sum due to him, if he makes default, he is to be condemned in all such Charges, as are made by the Defendant, since the day of the offer: and the Defendant (as above,) is to be condemned in Charges, which are made in the Sute, before the day of the offer, together with the Fee of the Sentence.

13. If the Plaintiff believes that there are more Tithes due to him, which extend to a greater value than the Sum offered; then his Proctor (upon the day which is assigned the Plaintiff to consider of this Sum,) must accept this offer, made by the Defendant, and the Sum offered, so far as they make on his Clients behalf, but if it makes against him in any thing, then he must dissent and protest as to the

nullity thereof, and offer himself ready to receive the said Sum in part of Payment and not otherwise, and must give a Libel, and desire that it may be proceeded summarily and plainly. Then the Defendant may take back the Sum offered, (though it is more safe to let it remain at the Acts of Court, whilst the Sute depends) and make mention in the Acts of Court, that because the Plaintiff hath refused to receive the Sum offered, in full satisfaction, he doth therefore take the same back. But observe, that in these offers of Tithes, if there are sundry Tithes due, of divers kinds, you ought to be advised as to the manner of offering these Tithes, (*viz.*) whether or no the Party offering, ought to declare particularly, for what Tithes, and what, and which Sum is offered for the same: For some of our late Advocates are of opinion, that a general offer doth not avail, and that the Plaintiff may refuse such a general offer, without any Dammage. But Mr. Clarke says he doth not remember, that he ever saw this practised or adjudged by the major part; for, for these forty Years last past (saving some late Years) this offer was wont to be made in general, (*viz.*) such a Sum for all the Tithes, and then the opinion of the Practitioners was, that it was most safe for the Defendant to offer a gross or general Sum for all the Tithes (as above) than to offer any particular Sums; lest perchance, the Party offering, should not offer the just value of every particular Tithe, and so should be condemned in Charges. Yet in ancient practice, if the Plaintiff did desire that the Defendant might offer particularly for those Tithes, for which he had made a general offer; the Defendant was obliged to offer particularly for the same; at least if the Plaintiff alledge that he intends to proceed for the Tithes *in specie*, and to obtain Sentence to have the same *in specie*, and not a Sum of Money, or any thing else in lieu of them.

14. If a Libel is given before an offer of the Tithes made, and the Plaintiff doth sue in the same, for the Tithes of Milk, Cheese, or the like, which are not to be paid *in specie*, by the Custom of the Parish, but only a certain Sum in lieu of them, is adjudged for every species of them; then if the Defendant doth offer a great Sum

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general by the name of all the Tithes, and the Plaintiff doth accept the same in full satisfaction, it shall seem that this offer was made for the Tithes *in specie* according as is desired in the Libel. In this case therefore, an offer may be made on this manner; for the Milk of Kine, according to the custom of the Parish, for every Cow two-pence; and for every Acre (upon which those Animals which are barren, do depasture) four-pence, according to the custom of the Parish. And so on other things, for which Tithes, are not to be paid in kind. Then the Plaintiff if he accepts the offer, made on this manner, he acknowledgeth the custom of the Parish. Let the Plaintiff be aware therefore how he accept this offer, though the true value of the Tithes is offered; for by accepting this offer, the Plaintiff doth acknowledge the custom of the Parish, although the Defendant by a general offer, for all the Tithes Libellate, doth seem to recede from the custom, and acknowledge the Tithes to be due in kind.

15. If an offer is made particularly, for such and such a Tithes (specifying the Tithes) the Plaintiff may receive any one of the Sums offered (and if sute is contested before this offer, he may desire that the said Sum may be decreed to him, by the Sentence of the Judge, and that it may be pronounced for his right in that behalf; and he may contest for the other Sums offered, (because the true value, or all the Tithes Libellate, are not offered) and he shall obtain charges of the whole sute, if he prove a greater Sum due to him, than the Sum offered and refused, (or not received) by him, or that there are more Tithes due, &c. And if on the contrary, he doth not prove a greater Sum, or more Tithes, he ought to be condemned in Charges as above.

16. If the Defendant is sued for Prædial or great Tithes, (to wit) for the Tithes of Corn and Hay; if he has not separated his tenth part, nor compounded with the Rector, or him who has the right of receiving those Tithes; he ought to offer three times the value of those Tithes; or admit the Defendant has set out the tenth part, but doth forbid or hinder the Rector, or other Person who hath right to them, so as he cannot gather, or carry the same away with

with safety, the Defendant ought to offer twice the Value of the Tithes: And this is provided by the Statute, (*Scil.*) three times, or twice the Value in the aforesaid Cases.

17. In a Cause of Tithes, though the Term Probatory be elapsed, and no Witnesses are produced, yet the Plaintiff, if he doth request it, is to be restored to his Term Probatory against it be elapsed; in order whereunto he must alledge that this Cause is a Cause relating to the Church, and that by the neglect of his Client, neglecting to produce his Witnesses, within his Term Probatory, the Church is very much injured; wherefore he must desire that his Party may be restored against his Term be elapsed. Then the Judge doth so restore the Party against his Term Probatory be elapsed, and doth assign him a new Term Probatory, in presence of the Proctor of the Adverse Party dissenting and protesting as to the nullity of this Petition, and the Decree of the Judge, and alledging that this Restitution ought not to be made, referring himself to the Laws. But observe, that this Restitution ought only to be made when a Clergy-man, and not a Lay-man, doth Sue for Tithes: And in such case, where the right of the Church is disputed; and not the particular right of the Rector, &c. that, is where the Defendant pretends, that there are no Tithes, nor any Sum due in lieu of Tithes, nor any Tithe in kind due at all. Yet if a Lay-man doth prove himself to be a Farmer, and the Defendant doth deny, that any Tithes ought to be paid to that Church whereof he is Farmer, then the Lay-man is to be restored as Rector. Mr. Clark has seen this Restitution obtained twice or thrice in one Cause, in a contradictory Court, upon the aforesaid Allegation. Yet if this Restitution be made oftner than once the Judge is wont to condemn the Party, (who desires a Restitution a second time,) in Charges for retarding the proceeding from the day of the first Restitution, until the day of the second Restitution. The particular Right of private Advantage (of which mention is made above) is said to be, when a Lay-man or Rector, in the aforesaid case, doth not prove the quantity or value of the Tithes sued for, nor that he is Rector or a Lay-farmer.)

18. If it is contested about a Benefice, (*viz.* whether

such or such an one be Rector or Vicar, then the Proctor either of the Plaintiff, or of the Defendant may alledge, that whilst the Sute depends, the Tithes and Profits of the living in Contest, are wasted; and it is to be feared, that the Parties will gather these Tithes by force of Arms; and also that by reason of this Sute, the Cure of Souls is not supplied, wherefore to avoid these Inconveniencies, he must desire that the Profits of the Living may be sequestered whilst the Sute depends, and that the Sequestration may remain in the hands of some other indifferent Persons. Then if it appears by the Acts of Court, that both the Defendants and the Plaintiff were Instituted to the Benefice in contest, though it doth not appear to the Judge, who hath the true right; or if Sentence is pronounced for the right of the one, against the right of the other, though it be appealed from that Sentence, or if it be contested betwixt two Rectors, about the right of the Tithes of such a piece of Ground; the Judge in any of the cases, may for the aforesaid Reasons, decree the aforesaid Sequestration, and commit the same to the Church-wardens, or other Persons of the said Parish; sufficient Bond being first given by them, for the due collecting and faithful keeping of these Tithes, to the use of those who have right to them, and that a just Account shall be made of them, when they are required. This Sequestration being thus interposed, the Judge is wont to appoint a Minister to serve the Cure whilst the aforesaid Sute doth depend, and command the Sequestrators to pay him out of the Profits, such Salary as the Judge shall appoint. And this Sequestration is to be published in the Parish Church, in time of Divine Service, that the Parishioners may have notice of it, and observe, that this Petition is wont to be made by that Party who is out of possession of the Benefice, though this hinders not, that the Party in possession may also desire a Sequestration for the Reasons afore-named. Now the Sute being ended, the Sequestration is to be released, and the Profits which are gathered, are to be restored to the Party who gets the Cause: And if the Sequestrators refuse to pay the same, they are to be called to give account of the things by them received, and are to be compelled by the
Eccle-

Ecclesiastical Censures, to pay those things received, *in specie*, if they are extant, if not, then the real value of them. And if by frivolous delays or appeals, they unjustly defer the sute, and do not give an account, the forfeiture of their Bond may be sued at the Common Law, (which was given at the time of granting the Sequestration) if the Judge (before or to whom this Bond was taken) is pleased so to order it. Which Judge, must give the Party grieved, those Bonds and Letters of Attorney upon the same, to sue and recover the penalty of the Bond, to the use of the Party so grieved.

19. So soon as it appears to the Judge, who pronounced the Sentence, (whether for the Defendant, or for the Plaintiff) that it is appealed from the same, the Judge may in these Causes, and (if it is requested of him,) he ought immediately to put the Sentence in Execution as to the Charges, and Tax the same, and compel the Party to pay them in all things, like as if it had never been appealed from his Sentence; and this also, notwithstanding any Inhibition which is served upon him, by reason of the Appeal interposed from the Definitive Sentence; and this is provided by Act of Parliament, *Anno 32. Hen. 8. Cap. 7.*

20. And although that Statute doth provide, that in a Cause of Tithes, though an Appeal be interposed from a Definitive Sentence, the Judge may execute his Sentence as to the Charges, and may Tax the Charges; yet seeing this Execution and Taxation ought to be made according to the exigence of the Law in that behalf, (that is, in the presence of the Party Appealing, or in penalty of his Contempt, if he be Lawfully Cited, and do contumaciouly absent himself) it is Lawful to appeal from the same, upon the account of a nullity, notwithstanding the aforesaid Statute; and if the Judge doth exceed measure in the Taxation of these Charges, (as when only ten pounds are due for the Charges, he being offended perhaps that it is appealed from his Sentence, doth Tax them to Forty Pounds) also if the Judge doth excommunicate the Party whom he hath condemned in Charges, for not paying the same, without giving him any Lawful Monition (at least to pay the same: The Party condemned in these Charges

may appeal not only from this excessive Taxation, (but also from the said unjust Excommunication, as above) notwithstanding the aforesaid Statute. The reason is, because in that Statute, it is provided in these words: And the Judge who pronounceth the Sentence, shall Decree or Tax the [reasonable] Charges of the Party obtaining the Sentence, notwithstanding it be appealed from the Definitive Sentence, &c. See the Statute. Therefore if the Judge exceeds measure in the Taxation of Charges, he exceeds the limits of his Commission, mentioned in the said Statute. Likewise if the Judge doth Tax those Charges illegally, *i. e.* in the absence of the Party or his Proctor; or doth Excommunicate the Party illegally, for not paying Charges without a Lawful Monition, to pay the Charges taxed, or before the Day assigned for Payment; in these cases (as well as from excessive Taxation, &c.) it is lawful to Appeal, notwithstanding the aforesaid Statute. For every Statute which is set forth against the Common Law, is to be strictly interpreted and taken, according to the Letter: And before this Statute was set forth, a Judge could not by Law, execute his Sentence (in a Cause of Tithes) as to the Charges, or Tax them; (at least he could not compel the Party to pay them) if it were appealed from his Sentence, to a superior Judge; and if the said Judge were inhibited or forbid to proceed. For at the time of making this Statute, all the learned Legislators were of this opinion touching the Charges to be taxed, or otherwise, what as is therein contained, would be void, (*Scil.*) that the Judge should decree reasonable Charges; and also in a certain Consultation held betwixt the Ecclesiastical Judges, and the Judges of the Common Law of this Realm, in the aforesaid Case, (*viz.*) whether or no it were lawful to Appeal from an excessive and immoderate Taxation of Charges, they were all of opinion, that it was lawful to Appeal in these Cases, notwithstanding the aforesaid Statute.

C H A P. VI.

The Whole Order of Proceeding in all Causes of
DEFAMATION.

S E C T. I.

1. *The word [convitii] ought to be contained in the Citation taken forth in this Cause.*
2. *What words the Libel ought to contain, and what ought to be proved in these Causes.*
3. *It is not lawful to Sue directly in these Causes, after a whole Year is elapsed, from the time of uttering the words.*
4. *In what cases an Action of Defamation may be commenced, though a Year is elapsed.*
5. *It is lawful to Sue indirectly in a Cause of Defamation; that the Party defaming may be pronounced to have incurred the Sentence of Excommunication, after a Year is elapsed.*
6. *Causes of Defamation commenced upon any Constitution, (in order to get the Defendant pronounced to have incurred the Sentence of Excommunication) are not to be instituted at the instance of the Party, as in other cases, but of the Office of the Judge promoted and implored by the Party grieved.*
7. *The Order of Reconvention in these Causes.*
8. *The manner of proceeding in these Causes, when the Party defamed Sues for Defamatory words, contained in a famous Libel.*
9. *A Witness being produced in a Cause, if he is defamed by Exceptions which are propounded against him, he may Sue the Party propounding them, in a Cause of Defamation.*
10. *The manner of drawing the Libel in the Cause.*
11. *The manner of proving the said Libel.*
12. *The form of putting Sentence in Execution, in the Causes of Defamation.*

IF no Action cannot be commenced for those words, (mentioned in the first Sect. of the fourth Chapter of first Part,) at the Common Law, then may the Party grieved, Sue in the Spiritual Court, for those or the like reviling words, in a Cause of Defamation or Reproach. And observe that this word [*Convitii* or Reproach] is wont to be writ in every Citation, together with the word [*Defamationis*, or Defamation] the reason is, (as Mr. Clarke has heard from more skilful Proctors) because if the Plaintiff doth not prove that the Defendant uttered words, which of their own nature were Defamatory, yet if he proves that the words were reproachful, he shall obtain the Victory: And then the Party uttering them, is to be punished at the pleasure of the Judge, consideration or respect being had to the Person defamed: The reason is, because these words were uttered out of a malicious and angry Mind, and besides, and against all Fraternal Charity.

2. And although in a Cause of Defamation, it is said in the Libel, that the words Defamatory were pronounced or uttered maliciously, and in a heat, yet if the words Libelled are Defamatory of their own Nature, they are presumed to have been spoke out of a malicious Mind, although the Malice be not proved. But in the aforesaid Causes, when it is sued for reproachful words, the Plaintiff ought to prove by grand Presumptions, as Brawlings, Chidings, (*Scil.* such as proceed from Malice and Enmity,) that the aforesaid malicious Words were uttered out of a malicious Mind: For otherwise, as was said before, if the Words uttered are not Defamatory of their own nature, they are not presumed to have been spoke out of a malicious Mind.

3. Seeing a Cause of Defamation is said to be a Criminal, or a mixt Cause, that is, partly Criminal, and partly Civil, if the Party Defamed doth not commence an Action, or Cause of Defamation, and contest Sute in the same, within a Year from the time of uttering the Words, the benefit of an Action is taken away by the lapse of the Year: Mr. Clarke has often seen it thus adjudged, by the Learned Judges:

Judges : For in this case, the Plaintiff seems to have remitted the Injury, at least he doth not seem to recal it to mind ; especially if the Party defaming, and the Party defamed (after the words are uttered) are very familiar and conversant together, in eating, drinking, and frequently saluting each other, or other signs of familiarity. But the Defendant intends to use the benefit of this Exception, to wit, that a Year is elapsed ; it is expedient (at least Mr. *Clarke* says it was so practised and consulted, in a very weighty Cause, by the most learned, Forty Years ago) that he alledge the Premises, before the Cause be concluded, and refer himself to the Libel, the time of Contestation of Sute, the Proofs, and to the Law. Yet some of our late Advocates are of opinion, that it is sufficient to acquaint the Judge with the Premises, after the Cause is concluded, at the time of giving Information in the Cause. Let the Plaintiff take heed therefore, (if it appear by the Premises, that a Year is elapsed from the time of uttering the words, until the time of instituting the Action, that he propound before the Cause is concluded, the Reason why he did not prosecute this Sute within a Year, from the time of pronouncing the Defamatory Words.

4. Now although it may appear by inspecting the Libel by the Depositions of the Witnesses of the Plaintiff, and the time of commencing the Cause, that a Year is elapsed betwixt the time of uttering the Words, and Commencement of the Action; yet if these Defamatory Words were uttered in the absence of the Plaintiff, he being then perhaps in remote Parts out of the Kingdom ; and if he doth institute the Cause, so soon as he returns, or at least within a Year after his return to those Parts, or that Parish, in which the Defamatory Words are pronounced, and doth cause Sute to be contested in the same, his Action is not taken away. Therefore if it doth appear by the Depositions, that a Year is elapsed from the time of uttering the Words, and before the Sute is commenced, though nothing is deposed by the Witnesses, touching the presence or absence of the Plaintiff. Therefore to avoid the disputes and questions in Law, the Proctor of the Plaintiff may alledge the probable Cause of his being ignorant that such words were uttered against

him, (*viz.*) that at the time of uttering the same, he was out of the Kingdom, or in remote parts, far distant from the place where those words were uttered; and that he hath Instituted his Action, within a year after his return to those parts, or that Parish where the Defamatory words were pronounced: Which things being proved, the Plaintiff shall obtain Victory in the Cause.

5. Also though the Party defamed has notice of the Defamatory words, and doth not commence his Cause of Defamation, within a year from the time of uttering the same, and from the time of having such notice; yet may he sue in a Cause of Defamation, after a year is elapsed, alledging in his Libel, the Provincial Constitution

which beginst *Authoritate Dei patris omnipotentis*, &c. and that the Defendant did utter such words, &c. that thereby he incurs the Sentence of Excommunication, pronounced in the said Constitution: And in the conclusion of this Libel, the Plaintiff must desire that right and justice may be administred, and that the Defendant may be pronounced to have incurred this Sentence of Excommunication. And Defamatory words being proved, (such as contain any

† *Linwood. de Senten. Excommun. c. Authoritate Dei patris omnipotentis; queritur si pars gravata, sit infamata de Crimine ante prolationem eorundem verborum per Reum; an Reus incideret in pœnam Canon. & Excommunicationis? Sest. item excom. verb. unde quamam circumstantia faciunt defamantem incurrere pœnam hujus constitutionis, & quamam penitentia satisfacit, eleganter notatur in gloss. super verb. quacunque de Causa.*

Crime, comprehended in the said Constitution) Sentence is to be pronounced, according to the Matters requested in the Libel, (that is) that the Party defaming hath incurred the Sentence of Excommunication, and that he is to be denounced as such; and the Defendant is to be condemned in Charges made by the Plaintiff, and is not to be absolved from this Sentence of Excommunication, until he doth satisfy the Church, that is, until he do Penance to be assigned by the Judge, for standing so long in the Sentence of Excommunication: For the Sentence of Excommunication pronounced in this case, doth afflict the Party from the day on which the Defamatory words were pronounced, and the Sentence pronounced in this case, is said to be Declaratory Sentence of the Fact committed. But the satisfaction made to the Church, (whereof mention is even

now made) is this; the Defendant convened ought first to confess, that he hath grievously offended God, by maliciously uttering Defamatory words against his Neighbour; and must name particularly (in the penance) the Plaintiff, and the Defamatory words themselves; and then he ought first to ask pardon of God, and afterward of the Party grieved. This penance, or rather this satisfaction to the Church, ought to be done either publicly in the Parish Church of the Party defamed, or of the Party defaming, or in any other place, to be assigned at the pleasure of the Judge, according to the quality of the Cause, and of the Persons.

6. But seeing that in all other Causes, where any one is sued, or an Action is commenced against any one, to have him pronounced to have incurred the penalty of the Canon, or the Sentence of Excommunication pronounced in the Canon, the Plaintiffs who are grieved and injured in these cases, are not wont to commence their Actions directly in their own Names, against the Parties offending, but only as Promoters of the Office of the Judge; imploring his Office in that behalf. For example, such an one laid violent hands upon a Clergy-Man, for which thing he is Excommunicate, *ipso facto*: Or such an one kept a brawling and a disturbance in the Church, for which thing, he doth incur the Sentence of Excommunication, *ipso facto*. Or such an one hath Temerarily Administred the Goods of any one Deceased, or doth obstruct and hinder, so as the Deceased's Will cannot have its effect, or so as the Goods cannot be prized and inventoried, by reason whereof they are Excommunicate, *ipso facto*: The Parties grieved in these cases, are not wont (if they desire that their Adversaries may be corrected and pronounced to have incurred the Sentence of Excommunication inflicted by Law) to commence these Actions and Causes in their own Names, but only to promote and implore the Office of the Judge, and Object and Article the aforesaid Crimes to the Defendants, in the name, and of the Office of the Judge, by them promoted. Upon the like reasons therefore, Mr. Clarke is induced to believe, that in Causes of Defamation, (that the Defendants may be pronounced, to have incurred the Sentence of Excommunication) it is requisite that the Pa-

ties grieved Sue not in their own Names, but only as Promoters and Implorers of the Office of the Judge; in which cases the effect or success, may be expected, as in a Cause of Defamation, otherways instituted. But in regard not only at this day, but by ancient practice of the Courts of the Arch-bishop of *Canterbury* these Causes of Defamation, (instituted as to the penalty mentioned in the Constitution) were and are wont to be commenced in the Names of the Parties defamed, (*viz.*) to answer N. in a Cause of Defamation, and not of the Office of the Judge promoted, therefore Mr. *Clarke* submits to the Judgment of the Learned Judges and Advocates, whether or no it be more safe, to commence these Causes of Defamation, according as it is practised at this day, or in manner as was even now spoke in this number.

† *Reconventio est nihil aliud quam Actio Rei conventi adversus Actorem, durante conventionis judicio vicissim sub eodem iudice legitime instituta. Ordo Cameral. p. 3. tit. 30.*

7. If any is cited to answer in a Cause of Defamation, if the Plaintiff hath also defamed the Defendant, the Defendant may in the very same Cause, reconvene the Plaintiff, † that is, he may give a Libel in presence of the Plaintiff or his Proctor, though no Citation was first taken out against him. But in these cases of Reconvention, the Parties must proceed together in the contesting of Sute, *in the desiring one and the same Term Probatory, in the production of Witnesses, in the conclusion, and in the pronouncing of Sentence; and so on in all things, unto the end of the Sute: And (as Mr. *Clarke* has commonly known, and had it practised) if Defamatory words, mentioned in the Libels are mutually proved, a mutual

* *Reconventio in proprie & improprie dictam dividitur. Illa debet ex periri simultaneo processu, ante litis contestationem; hæc vero ante sit conclusio in causa, sed processu separato, Ummius disput. 10. n. 19. in fin. Jacob. Blum. process. Cameral. tit. 40. n. 12. Alciat prax. de reconventionem fol. 123. Lanfr. c. sape. n. 41, quando habet locum reconventio ibi tractatur, & n. 42, 43.*

compensation is to be made, both as to the Penance and the Charges; that is, there ought to be no Penance enjoined, nor any condemnation in Charges on either part. But it is otherways, where two several Causes of Defamation are commenced. And observe, that in Causes of Reconvention, though a Compensation or a Composition may be made betwixt the Parties; yet seeing Defamers are by Law to be corrected, and are also by the Provincial Constitutions, to be denounced for Excommunicate

Persons, the Judge may, if he will, correct these Defamers of his mere Office, at his pleasure.

8. Now in such case where the Party defamed sueth for Defamatory words contained in a famous Libel, the Plaintiff must not only propound that Article which is so general and usual in a Cause of Defamation, (*viz.*) that the Defendant upon such a day, and in such a place uttered such words, (*Scil.*) the words contained in the famous Libel, &c. but also another special and particular Article, that upon such a time, and in such a place, the Defendant writ and published, or caused to be writ and published, a certain famous Libel, annexed to these presents, [if the Plaintiff has the Libel, if not, then he must say in this special Article] containing these following words, or the like words in effect, and here must be inserted those Defamatory words, contained in that famous Libel.) Or if the Plaintiff has only a Copy of that famous Libel, the said Copy is to be annexed to the Libel, which is given in this Cause of Defamation, adding these words, [the tenor of the Schedule annexed to these presents, which he desires may be accounted as read, and inserted here.] And if the Plaintiff proves his Intention, the Parties defaming on this manner are to be punished with a more grievous punishment, than those who defame only with words.

9. Although the Plaintiff or the Defendant, may have propounded Exceptions against Witnesses, [for their defence, as they pretend, containing Ecclesiastical Crimes, and Defamatory words, for which the Witnesses are liable to be corrected in the Ecclesiastical Court; yet if they make default in the proof of these Exceptions, the Witnesses may commence an Action, either before the same or any other Competent Ecclesiastical Judge, against the Parties propounding these Exceptions, in a Cause of Defamation; notwithstanding that the Party propounding them said Exceptions, doth at the time of propounding them protest that he doth not propound the same, with an intent to defame the said Witnesses, but only for his own just defence in the said Cause: Which Protestation wont to be inserted at the end of the Exceptions, or at least in the Acts, at the time of propounding the same

10. In this Libel is inserted not only those general and usual Positions, which are put in an ordinary Libel, in a Cause of Defamation, but also the special and particular Positions following are to be added. (*viz*) *Item*, That upon such a day and year, in such a Cause, betwixt such Persons, *M.* (that is, the Plaintiff in this Cause) was produced in this Court (or in such a Court, if the Cause of Defamation is not instituted in the same Court, where the Witnesses were produced) as a Witness, and was Sworn and Examined, as appears by the Acts of the Court, to which the said Party thus propounding, refers himself. *Item* that *N.* the Party against whom the said Witness, (now Plaintiff in this Cause) was produced, upon such a day and year exhibited certain Exceptions, or rather a certain famous Libel; such a Position whereof (containing the effect or tenor following) is specified in the Schedule annexed to these presents: And here must be inserted, the Tenor of that Position, which contains the Defamatory words. *Item*, that the said *N.* the Defendant in this Cause, hath made default in proof of the said pretended Exceptions, or rather of the famous Libel, mentioned in the aforesaid Position, or specified in the Schedule, annexed to these presents: And then the other ordinary Positions are to be inserted.

11. If the said Cause of Defamation is Instituted by the Witness in the same Court, in which the Party defamed was produced as a Witness; then after Sute is contested, and a Term Probatory is assigned, the Proctor of the Plaintiff may acquaint the Judge, that in supply of proof of the Contents of his Libel, already given in this Cause, he doth exhibit a certain Act dispatched in this Court, (that is, the Act dispatched on the day, in which the Exceptions were propounded) betwixt *N.* and *M.* (*viz.*) betwixt such a Plaintiff and such a Defendant in such a day and year; and also those particular Exceptions themselves, and especially such a Position of them, propounded by the said *N.* (the Defendant in this Cause of Defamation,) on the day and year aforesaid given into Court, and remaining in the Custody of the Register of this Court, whereof mention is made in the aforesaid Act: And then he must

alledge, that all and singular the things and matters contained in the said Act, were had and done, like as is contained in the same, referring himself to the Acts and the Registry of this Court, so far as they make on his behalf. If the Defendant in this Cause of Defamation, hath proved the said Exceptions, in that first instance, wherein he propounded them, he may reply for his defence, that he hath proved and justified these Exceptions, and that he did not propound the same, with an intent to defame the Witnesses, who is now Plaintiff, but only for his just defence in the Cause; which Allegation being admitted, in supply of proof of the same, he may in manner and form aforesaid, exhibit the said Acts, and the Depositions of the Witnesses by him produced, upon the aforesaid Exceptions. But admit the Defendant has not proved those Exceptions in the said instance, yet he may prove the same in this instance: And if he doth prove them, he must be dismissed with Charges, from the instance of this Plaintiff, who pretends himself so defamed. But if this Cause of Defamation is not commenced in that same Court, in which the aforesaid Exceptions were given, then to prove the Libel, the Act and the Exceptions aforesaid are to be exhibited under the Hand of the Register of the Judge, before whom they were given, or else by a publick Instrument, under the Seal of the Judge, and the Subscription of the Register. And so in all things else, the Defendant must prove as before, (*Scil.*) that he hath already proved the Exceptions given by him, in the first instance; and he must alledge and prove it, like as is shewn [touching the Exhibition of an Instrument, made upon an Extrajudicial Appeal] this only excepted, that if the Proctor doth deny that such Exceptions were given and propounded, the Plaintiff ought to prove it by Witnesses, (*viz.*) by the Register, the Actuary, the Scribe and their Clerks, or by a search. And observe, that if the Proctor in the name of his Client, and by vertue of a special Proxy, did propound the said Exceptions, the Defendant in whose name these Exceptions were propounded, must not be sued, but the Proctor who propounded them. Therefore let the Proctor beware. may also be enquired here, whether or no the Proctor

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which are made upon the aforesaid Exceptions, when the Cause depends betwixt other Persons, and in the absence of the Witness, do make full proof against this Witness, in order to justify the proof of the said Exceptions, in this Cause of Defamation. Admit they do make proof, yet the Party defamed may except against, and reprove those Witnesses, whether the Party (against whom they were produced in the first instance, or Cause) did except against them or not, at the time of their being produced to prove those Defamatory Exceptions.

12. In order to get the Sentence put in Execution in this Cause, the Party who gets the Sentence, must certify and exhibit a Citation, accuse the Contumacy, and make request as is shown [touching the manner of putting the Sentence in Execution, the Plenary Causes] until you come at these words [and then a Monition is to be granted] instead of which words, the Party obtaining the Sentence, must desire the Judge to decree the Party [against whom Sentence is pronounced] to be called to appear upon such a day, to see Penance enjoined him, and to receive this Penance; as also that he may be admonished to pay the Charges, and so on according to form. Which Petition the Judge grants; and if the Monition is executed upon the Party in due time and place, and is brought into Court with an Authentical Certificate, if the Party doth not appear, Penance cannot be enjoined in Penalty of his Contempt, at least he cannot be admonished to do the same, (the reason is, because that although Penance might perhaps be enjoined in Penalty of his Contempt, yet the Party not appearing, he cannot be admonished to perform the same) but he is to be Excommunicate in Penalty of his Contempt: And if he appear afterward, the Judge may (at the Petition of the Plaintiff) assign the Defendant to do Penance, for uttering these Defamatory words: (*viz.*) If the Defamatory words were uttered in a publick place, then the Penance is to be done publickly: Though it is wont to be done in the Parish Church of the Party defamed, in time of Divine Service in presence of the Party, (if he thinks fit to be present;) but Linnen Vestments must not be put on, as in Causes of

Correction. But if these Defamatory words are uttered in a private place, then the Penance is to be done in the House of the Party defamed, or in the House of some honest Neighbour; and the said Penance is wont to be enjoined on this manner: The Party defaming must say publicly, that in saying such and such words, (*Scil.* those words which the Judge has pronounced in his Sentence, were spoke) he hath defamed the Plaintiff; and therefore he must first beg pardon of Almighty God, and then of the Party defamed, for uttering these words. This Penance being ordered and enjoined on this manner, the Judge at the Petition of the Party defamed, must admonish the Party defaming, to perform the said Penance on such a day, and to certifie under the Minister's Hand, (and the Hands of those who were present at the time of doing this Penance,) as to the manner of performing the same on that day; or else to appear upon the same day, to see himself Excommunicate, for not doing according to such Monition.

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C H A P. VII.

Of Double QUERELES. Their Difference, and the whole Order of proceeding in them.

S E C T. I.

1. *Of a Double Querele in a Cause about a Benefice, what it is.*
2. *What things are contained in this Double Querele, and the form of it.*
3. *The manner of Executing this Double Querele, and what things are to be done by the Party who is presented to the Living.*
4. *The manner of obtaining a Citation Viis & modis, if the Bishop cannot be Cited.*
5. *In what case the Party presented is not bound to expect the time assigned the Bishop to Deliberate, as to the Institution.*
6. *The form of Certifying the Double Querele..*
7. *The Petition of the Proctor, in order to get the Judge his Decree, when the Double Querele is returned, if the Bishop appears not.*
8. *The form of the Oath to be taken by the Minister, to be Instituted to the Living.*
9. *The manner of proceeding in this Double Querele if the Bishop doth appear.*
10. *Of a Double Querele in other Causes.*
11. *A Third Person may come in for his Interest in these Double Quereles.*

† *Gail. li. 1. obs. 28. & Tholos. de appel. li. 2. c. 28. vide tract. de jure patronatus Pauli de Cildinu, part. 6. art. 2. n. 2. pag. 585.*

* *Non sit instituenda ante lapsum 28. dier. juxta constitut. Ecclesie Anglicane, nisi alius ab episcopo sit institutus, an ne decursum eorundem dierum. Can. 95.*

IF a Clergy-man is presented to a Church, † and doth exhibit this Presentation before the Bishop of the Diocese, or his Vicar General in Spiritual things, who has power to institute, and doth request to be instituted by him; if the Bishop doth refuse to institute and admit him, he may complain thereof, to the Official of the Arches, or to the Judge of the Court of Audience, which Judges are wont to write back to the Bishop in form of Law; to the following Effects, and that Rescript is called a Double Querele.

2. The Double Querele is * to be drawn in the name of the Judge, who grants the same, and must be directed as an ordinary Citation is directed, and this Double Querele must first contain briefly these things, (*viz.*) That such an one being presented to such Benefice now vacant, hath desired Institution, and the Bishop hath refused to admit him. Then ought to be inserted, not only the Monition, but also the Citation and an Inhibition as follows. (*viz.*) First, The Bishop or his Vicar General (who hath power to Institute) must be admonished to admit and institute N. the Person presented to such a Church, within such a time, (to wit) within nine days, or sometimes within fifteen days; three of which days, (if nine are appointed,) or five, (if fifteen are appointed,) are wont to be assigned, the Judge, (from whom it is complained) for the first Peremptory Term, and three or five for the second, and three or five for the third Peremptory Term, and a Canonical Monition: Which days being elapsed, and the said N. not being instituted, nor Justice being administered, the Bishop must be Cited to appear in Person or by his lawful Procurator (who is sufficiently instructed) upon the tenth or fifteenth day, after the Execution of this Double Querele (if it be a Court Day) or otherways upon the next Court Day, (as in an ordinary Citation) and alledge and shew a reasonable and lawful Cause, if he hath or knows any why (for this his neglect, and the not administering Justice) the right of instituting and inducting the Minister presented, may not occur to the Judge who grants the Double Querele, and why the Minister thus presented may not be instituted and inducted upon his Mandate.

The Bishop and his Vicar are also to be inhibited, that whilst this Double Querele depends undetermined, they do not attempt to do any thing, in prejudice of the Party complaining, under Penalty of the Law. It is very necessary that this Inhibition be made; for sometimes the Bishop, or the inferior Judge, after the Execution of this Double Querele, and before it be returned, (at least before the day of appearance) doth admit another Clergyman, to the great prejudice of the Party complaining, and in contempt of the superior Judge. Which thing if they do, they are said to have committed a greater contempt than if they did it, where no Inhibition is: And such an Admission being made, (after the Execution of this Double Querele, and after the aforesaid Inhibition, granted by the Judge who grants this Double Querele) is first of all to be revoked, and to be declared as null, and invalid. The Arch-bishop also, (whose Jurisdiction and Authority is contemned in this case,) and likewise the Official of the Arches, (as appears by the antient customs of that Court) may proceed against the Bishop thus attempting, a Cause of contempt, and may correct him at his pleasure, Canonically; yea although the Person presented, and obtaining this Double Querele, were found altogether unfit, in respect of his Conversation, his Manners, Religion and Doctrine. But the punishment and correction of the Bishop † offending in this case, is wont to be referred to the Arch-bishop himself.

In order to get this Double Querele Executed, the Party presented must procure some Literate Person to advise with the Bishop, to institute the Person presented, to administer Justice, within the time mentioned in the Double Querele, and also to Inhibit him, according to the Terms of the Inhibition therein mentioned likewise: Which being executed within three days, the Minister who was presented, must go to the Bishop, and with all due Reverence, must desire that he may be Instituted, and that Justice may be done him; and must offer himself ready prepared to Subscribe the Articles of Religion, (which are usually subscribed by the Clergy, at the time of their being admitted to Ecclesiastical Benefices) and to take the

† *Episcopus non potest ab officialibus Archiepiscopi censura irretiri, si ipse Archiepiscopus sit in provincia vel prope. c. 1. Sect. 1. de officio ordinari. n. 6. ubi gloss. & D. D. in Decr. quos quidem sequitur Ugolinus de Off. & potest. episcopi c. 2. Sect. 2. n. 9. verb. octavo ab Officialibus.*
Oath

Oath of Supremacy (according to the Statutes of the Realm, set forth on that behalf) and of his Canonic Obedience to the Bishop, or any other Lawful Oath, required in this case. And this the Party presented must at two times more, within the time prescribed, (*viz.*) upon each third day (if nine days are appointed,) or upon the fifth day (if fifteen days are appointed for the Institution) at least, if he can have the presence of the Bishop; if he cannot, then he must make a Protestation hereof, and request Witnesses to give their Testimony upon it: And the Bishop within the time assigned, takes no care to institute the Person presented, then these deliberatory days being elapsed, the Person presented must take care that the Bishop be Cited according to the Tenor of the said Double Querele.

4. If the Bishop doth absent himself from the Mandatary, or rather is hindered by other urgent Affairs, so as the Mandatary cannot cite him; the Mandatary must signify (with all due Reverence) to those of the Family of the Bishop, that he hath a Citation, (*viz.*) a Double Querele at the instance of N. the Minister presented to such a Benefice, to execute upon the Bishop, and must desire that he may come to the Speech of the Bishop; which if he doth not obtain, the Person presented must expect that day which was intended for the Bishop's appearance, if in case he had been Cited, and then get him called, and if he doth not appear by his Proctor, nor satisfy the Contents of the Double Querele, a Citation must be Decreed against him, *vis & modis*, as in other Causes; but before the same is executed, a Petition must be made by the Mandatary to the intent that he may have access to the Bishop, to execute the Mandate upon him personally, and if he doth not so do, then the Citation is to be affixed to the outermost Doors of the Bishop's Palace, or of the House where the Bishop resides, or else upon the Doors of the Cathedral Church of his Bishoprick.

5. If the Bishop is admonished by the Mandatary, or requested to administer Justice, and admit the Person presented as above, and after the aforesaid Mandate is executed, he doth refuse expressly to institute the Person

sent

ented, or to admit him; then the aforesaid Mandatary may immediately cite the Bishop to appear as above, and the Party presented is not bound to expect the time given in the Double Querele, † that is, he is not obliged to go † *Imo vero casu quo Episcopus expresse dixerit se nolle admittere presentatum, potest obtinere duplicem querelam non exceptato decursu 28 dierum, juxta Can.* to the Bishop, nor to cite him, after the days assigned to institute, are elapsed; the reason is, because time was given him to consider of it, and he by expressly refusing to institute, doth refuse the time given him to deliberate or consider of it.

6. The Mandatary ought to certify the Party complaining, or his Proctor by Letters, or by a Subscription indorsed on the back of the Double Querele, not only as to the day of the Execution of the Monition, made to the Bishop to institute the Party, but also as to those days, in which the Party presented did desire himself to be instituted, also on what day he cited the Bishop to appear, and on what day he inhibited him; and if the Bishop refuse to admit the Party presented, the Mandatary ought likewise to certify that.

7. On the day assigned for the Bishop's appearance, the Plaintiff's Proctor must exhibit his Proxy for N. the Clergyman presented to such a Benefice, &c. and bring in the original Mandate, with a Certificate indorsed thereupon, and must accuse the contempt of M. W. the Bishop, who was admonished to institute my Client, to the Church of R. within the time specified in this Mandate, and to administer him Justice, or otherwise to appear on this day, in his place, to shew Cause, why through this Neglect, the right of instituting the said N. ought not to accrew to this Court, and the Judge thereof: And seeing he has not taken care to institute the said Plaintiff, nor to administer Justice, nor to appear, nor to alledge any Cause; wherefore the Proctor must desire that he may be accounted Contumacious, and in penalty of his Contempt, that it may be pronounced and Decreed, as is mentioned in the said Mandate, now brought into Court, (that is) that it may be pronounced for the Jurisdiction of this Court, and that the right of Institution, &c. doth accrew to the Judge of this Court, through the Neglect of the Bishop. Then the Judge must cause the said Bishop to be called three times publicly; and

and if he doth not appear either by himself or his Proctor the Judge must pronounce him contumacious, and in penalty of his Contempt, he must pronounce the right of instituting *N.* to the said Rectory, to be devolved to the Court, through the neglect of the Lord Bishop, and must decree the said *N.* to be instituted to the said Church, and that the Ordinary of the Place, (*viz.*) the Arch-deacon shall be commanded to induct him. In these cases, the aforesaid Call being made, the Judges are wont to remove the Minister presented, to the examination of the Arch-Bishop, that if he finds him capable, he may write back to the Judge, in order to have him admitted: Then a Bond must be entered by the Minister to be Instituted, to keep harmless the Judge (who institutes him) by reason of the Institution, according to the use of the Registry. In the like and the like Causes, it hath been used (time out of mind) that the Letters of Institution are to be passed under the Seal of the Judge, and to be delivered to the Party, and a Mandate is to be decreed to the Arch-deacon of the Place, for his Induction: Which Arch-deacon is wont to appear and ought either Personally, or by his Official, really and actually to induct the Minister instituted to this Benefice, and give him real possession of it.

8. Now the Minister presented to a Living, before he is instituted, ought first to take the Oath of Supremacy mentioned in the Act of Parliament, and then he ought to Subscribe the Articles of Religion, mentioned in the Statute, and then he ought to Swear Canonical Obedience to the Arch-bishop of *Canterbury*, and (if he be a Vicar) he ought also to Swear, that he will keep residence in his Vicarage.

9. If the Bishop doth appear, and doth alledge sufficient Causes, why he did not admit the Minister presented, as for Example, because the Church is already full, or reason of another Incumbent; or that the said Minister is infamous, vicious, symoniacal, or one unlearned, so as that he cannot give an account of his Faith in the Latin Tongue, or that he hath another Benefice, much exceeding the value of the Living in Contest, in value: Then they must proceed in the business, as in other summary Causes, and both Parties must reply, give Duplications, and except against the Witnesses

in other Summary Causes: And if in the end, these Causes al-
leged by the Bishop, are not prov'd, it must be pronounced
as above, (by the Definitive Sentence, or the Interlocutory
Decree) for the Jurisdiction of the Judge, and the Party pre-
sented is to be Instituted, (the Premises before specified being
observed) and the Bishop is to be condemned in Charges. But
if the Bishop doth prove the Premises objected, or any part
of them (in order to stave off the Intention of the Plaintiff)
why he was not obliged to Institute the said Minister, and
that he is not contumacious for not Instituting him, (notwith-
standing he were admonished as above) then Sentence is to
be given for him, and the Minister so presented, is to be
condemned in Charges, which are made on behalf of the
Bishop. But if the Bishop will not contest, nor defend
the aforesaid Sute, the other Clergy-man, (who possesses the
Benefice in controversy, or is perhaps presented to it,) is
wont to take the Sute upon him, and appear and alledge,
that the Church is full, in respect of his Person. But if
these Alledgments are given on the part of the Minister
presented, and not of the Bishop, the Judge of the Que-
rele, is wont first to pronounce for his Jurisdiction in this
half, and that the right of Instituting is devolved to him,
and to his Court, (if none of the Premises obstruct) be-
cause the Bishop hath alledged no Cause, why it may not
be so pronounced: Yet these things ought to be done, in
avoidance of the contempt of the said Bishop. And though
the other Minister who is thus presented to the Living al-
leges, is wont to take this Sute upon him, yet if the Bishop
refuseth, and if he gives a sufficient Mandate for it,
the Clergy-man (who is also presented to the Benefice
in controversy, and who intends to oppose the Admission
of the Party complaining) may Fee a Proctor, in the
Name of the Bishop, to alledge those Causes against the
Admission of the Party complaining: And in this case,
because these things are alledged in the Name of the Bi-
shop, they ought not to pronounce for the Jurisdiction of
the Judge, unless in the event of the Proof, or non pro-
of of these Alledgments. But observe, that if the Cause
by the Bishop hath refused to admit the aforesaid Clergy-
man, (who took out the Double Querele) be this, (*Scil.*)
that

that another Clergy-man is also presented to the said Benefice, this Cause is not sufficient, and concluding, so as to excuse the Bishop's Negligence. For if two Clergy-men are presented to one and the same Benefice, the Bishop to purge his Negligence, ought to make an Inquisition about the right of Patronage; and he is altogether negligent, (while the Church is vacant) two Ministers are presented to the Living, and the Bishop doth not proceed to an Inquisition. But if it doth appear to the Judge, (to whom it is complained for Justice as above) that the said first Clergy-man, thus complaining, ought not to be admitted, by reason of his Incapacity, or other Defects, if the second Clergy-man (exhibiting his Letters of Presentation, to the Church in controversy, and desiring to be admitted to the same) is found capable, he is to be admitted by the said Superior Judge, and is not to be committed to the Bishop: Because that in this Vacation, through the Negligence of the Bishop, the right of instituting doth accrew to the Superior Judge. But admit no Cause can be objected against the first Clergy-man, as to the ability of his Person, and that (through the Negligence of the Bishop, alledging no Cause, &c.) he be pronounced for the Jurisdiction of the said Superior Judge, and admit that one of the Clergy-men doth intend to have his Admission to the said Benefice, the Judge in this case, ought not to admit either of the Clergy-men, although nothing is objected against them, because they are presented by diverse Patrons, but he ought to proceed in the business of Inquisition, as to the right of Patronage, and then Inquisition being made, the Judge ought to admit that Clergy-man, for whom the Verdict is given. Last. The aforesaid Clergy-men ought to take care respectively that they exhibit their Letters of Presentation to that Judge, living in controversy, within six Months from the time of its being vacant, lest perhaps the said six Months being elapsed, the Bishop (to whom by reason of the lapse of that Term, the Collation of the said Benefice doth belong) do come in for his right, or another third Person, to whom the Bishop hath given the Living, by the lapse of the Term. For in this case, six Months from the Day of the Living becoming vacant, is sufficient to make the Term lapsed, notwithstanding

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withstanding the dependance of the aforesaid Sute, if the Patron or Patrons have or hath not presented within those six months. For it is not sufficient for a second or third Clergy-man to come for his Interest, in a business of double Querele, commenced against a Bishop, or that the first Clergy-man, who was first presented, do alledge that he was presented, but he ought to exhibit his Letters of Presentation, and desire his Admission and Institution, and then the time doth not lapse.

10. Likewise also the Official of the Arches, or the Auditor of Causes of the Court of Audience, may write back by way of Double Querele, † in any other Cause, where Justice is denied, not administred or delayed; to wit, if the Inferior Judge doth refuse, or unjustly defer to prove a Will exhibited by an Executor, or to grant an Administration to the next of Kindred who desires it; or doth refuse to revoke an Administration, which is illegally granted against the Law and the Statute; if this Petition be made upon three several Court days, and that it may be done instantly, the aforesaid Superior Judge may write back to the Inferior Judge, by way of Double Querele, in manner and form as in the following case. If a Judge in remote parts, or the Bishop of any Diocese, or his Official, or any other Ecclesiastical Judge, doth assign to hear Sentence in any Ecclesiastical Cause, for four or more Court days together; and shall be informed by the Party who desires the Sentence, as well in matter of Fact, as in the Law, and yet the Inferior Judge, will not, or doth unjustly defer to pronounce Sentence, either for the Plaintiff or the Defendant, though he be often called upon, and requested very earnestly, and at several times to do it, (viz.) three several Court days, either of the aforesaid Judges of the Arches, or of the Audience, may at the Petition of the Party grieved, write back, by way of a double Querele, and admonish the Inferior Judge to Pronounce Sentence, and Administer Justice, within some convenient time, (viz.) within fifteen days, as above, or otherwise he must be Cited to appear upon the fifth, sixth or tenth day after the Execution, &c. (according to the pleasure of the Judge, from whom it is complained)

† *Marrantia*
Speculator
verb. & quant.
deq; appellatur. n. 114.
uq; ad n. 122.

from the Court of the Judge, (to whom it is complained, *Scil.* the Superior Judge) to shew cause, why (by reason of his negligence, in not administering Justice,) the right of proceeding in the said Cause, (according to the Acts, and things done before the said Judge, at the time of Executing the said Double Querele,) and the right of Pronouncing Sentence, may not be devolved to the said Court, and the Judge thereof: And it must be proceeded in all things, as above; that is, if the Inferior Judge being Cited and Admonished, doth not appear, nor doth alledge any concluding Cause, why he hath not done the Premises contained in the Double Querele, he is to be pronounced Contumacious, and in Penalty of his Contempt, it is to be pronounced for the Jurisdiction of the said Superior Judge, and it is to be proceeded in the Cause, according to the former Acts, and as is usually proceeded in the aforesaid Cases, about the proving of a Will, or granting of an Administration; and then a Monition is to be decreed, (when it is complained for the not Pronouncing Sentence) as well for the Proceedings, as against the Party Querelate, that is, the Adverse Party, to appear on some day, to see further Proceedings made in his presence according to the form of the former Acts, and especially to see and hear a Term assigned, on which Sentence may be pronounced, and to see Sentence pronounced on the Term. If the Party Cited doth appear, and if the Proceedings are transmitted, they must proceed as in other Causes, according to the form of the former Acts, before the Judge to whom it is complained: But if the Adverse Party appears not, he is to be Excommunicate for Contempt, those things being observed, which the Law requires should be observed in that behalf. Likewise a Judge and a Register, do not take care to transmit the Proceedings, according to the Monition, they are to be Excommunicate, as in a Cause of Appeal. Yet observe that if the Party complaining, doth desire expedition in the Cause, and doth justly suspect, that his Adverse (with intent to protract the Sute) will not appear, he will rather undergo the Sentence of Excommunication, and will persist in the same, forty days together, he may

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get a clause of Intimation inserted (in the above mentioned Citation against the Adverse Party, to see Proceedings made, according to the form of the former Acts,) that if the Party Cited doth not appear, then the Judge doth intend to proceed according to the former Acts, and also to the Pronouncing of the Definitive Sentence, inclusively. In this case of Citation and Intimation, the Judge may proceed, and pronounce Sentence, in Penalty of the Contempt of the Party Cited, and the Proceedings are valid. Likewise the Superior Judge, may at the instance of the Party grieved, write back, by way of a Double Querele, if a concluding matter, or Allegation is given by the Plaintiff, or the Defendant, and the Inferior Judge, (though he is often called upon, and requested instantly, (and that upon three several Court days, to admit the same) doth not admit the same, or doth unjustly defer the Admission of it, by assigning to hear his pleasure from one day to another, upon his Admission thereof, and so doth justly defer the Sute, the Party thus grieved, may also appeal from this delay, as is shewn in Causes of Appeals: But to avoid expence, the Parties grieved in this Case, do choose rather to obtain a Double Querele, then an Inhibition; believing and hoping that the Inferior Judge will admit the Matter, or Allegation, and administer Justice, and pronounce Sentence, rather than the Cause by means of this Double Querele, should be tryed before the Superior Judge; by reason whereof the said Inferior Judge would lose his due Fees, which are due to him for the Prosecution, and discussing of this Cause. For in a Case of Double Querele, if the Judge is admonished to administer Justice, and doth do it, upon such Monition, the Proceedings are not to be transmitted, but it is otherways in Causes of Appeal.

ii. In a Cause of a Double Querele about a Benefice, a third Person may come in for his Interest, as is shewn at the First Chapter, and First Sect of this part, at the eighteenth Number.

C H A P. VIII.

The manner of Proceeding in the Business called the
RIGHT of PATRONAGE.

S E C T. I.

1. What the Right of Patronage is:
2. The reason, manner, and order of the Bishop's appointing a day to proceed in this Business, and a Monition against the Patrons, and the Clerks presented and the whole order of making preparation for the enquiry about this Business.
3. The tenor or effect of the Articles which are to be administered in this Business.
4. The manner of Proceeding in the said Business of inquiry at the time of the return of the aforesaid Citory Mandate.

THE Right of Patronage is a power (belonging to the Patron for certain Causes) of presenting to the Bishop, a Minister to be instituted to an Ecclesiastical Office

† It a Lancelot. Aliter vero deficiunt
Rochus de Curte tract. de jure patron.
c. 1. n. 14. Anton. de Butrio lectur.
ad tit. de jure patron. n. 1. Conf. Joh.
Nicol. Delphin. tract. de jure patron. n.
23. Besold. dissert. de patrocínio &
client. n. 56.

or other Benefice become vacant. †

2. If two Patrons have presented Clergy men to the Ordinary respectively, and these Clergy-men do insist have their Admissions, and the Bishop by admitting the one, doth reject the other; he that is rejected, or at least

his Patron hath an Action against the Bishop, (not in the Ecclesiastical Court) but at the Common Law; and may bring a *Quare impedit*, or the like Action against him

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*Therefore in these cases, the Bishop is wont to decree that it shall be proceeded in the business which is called the Right of Patronage; that is, the Bishop is to appoint a certain day, to sit in the Church which is vacant, and must decree a Monition against the Patrons who present, and the Ministers that are presented to be present then, to see the Proceedings made in this business, according as the Law requires; against which day, the Bishop must take care, that six Clergy-men, and six Lay-men (who are Neighbours, or live near the said Church) be Cited to the effect here mentioned, (*Scil.*) to be present at the day and place assigned, to take the Oath of making a faithful enquiry, upon certain Articles, then and there to be administered to them, touching an enquiry about the Right of Presentation to the said Benefice. A publick Edict is also to be decreed against all who have, or pretend to have any right or interest in the said business, that they be present on the day and place aforesaid, to propound their Interest in that behalf, if they have any: And against the day of the appearance of the said Persons so Cited, as well in general, as in special. Articles are also to be drawn, which are to be enquired upon, by the Parties Sworn; but the publick Edict is to be affixed to the outermost Doors of the Church in Controversie, in time of Divine Service.

* Some are of Opinion, That the Bishops now adays will be easily drawn to gratifie one of the Clerks or Patrons rather than the other, and Institute him, and make themselves liable to a Quare Impedit; so that quod dicunt de jure patronatus, is now almost quite out of use.

3. The Articles are these: First, who hath or did present last, to the Church of N. at the last Vacation, as also for the two or three last times, of the said Living being vacant. *Item*, Whether or no the Person or Persons who presented the last two or three Vacancies, have presented upon his or their own Titles. *Item*, Whether or no either of the Clergy-men presented, be noted, or suspected for any notorious Crime, as of Heresy, Symony, Perjury, Adultery or Drunkenness. *Item*, Whether or no either of the Clergy-men now presented, hath given or promised any Monies or reward by himself, or by any other Person in his name, or by his consent or approbation, directly or indirectly, (in order to obtain a Presentation to the said Benefice) to the Patron thereof, or to any other who hath

hath presented the said Clerk, or procured him to be presented.

4. The aforesaid Mandates, as well against the Clergy-men, and the Lay-men, as also against the aforesaid Persons, as well in special, as in general, ought to be duely and authentically certified, (*viz.*) either by the personal Oath of the Mandatary, or by an Authentical Certificate authentically Sealed, and writ on the backs of the aforesaid Mandates; and the Parties Cited, as well in special as in general, being publickly called, and appearing, it must be proceeded in the said Business, in their presence and in Penalty of the Contempt of the Parties who do not appear; they being first pronounced Contumacious, according to the Tenor of the aforesaid Mandates, and the Lay-men and the Clergy-men, are to be Sworn to make a faithful enquiry upon the Articles then ministred, and publickly read, and delivered to them, and of returning in their Verdict, or Judgment, upon the same day, or the Cause be dubious, within two or three days; and the aforesaid Jurors, or Enquirers, do return their Verdict that such a Patron, or Person presenting was in possession of the Right of Presentation, at the time of the last Vacation, the Clergy-man of this Patron, (if none of the aforesaid Articles obstruct) is to be admitted. And here it is to be noted, that the aforesaid Patrons, are wont to take care, that Advocates, and those who are skilled in the Statute Laws of this Realm, be present at the time of executing the aforesaid Inquisition, to inform the Conscience of the Jurors; and to exhibit, at least to shew these inquisitors the Instruments, and all manner of Evidence for the proof of the Law, about the right of Presentation.

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C H A P. IX.

The whole order of Proceeding against TEMERARY ADMINISTRATORS.

S E C T. I.

1. When and in what case this Action doth lye, and when an Action of Detinue doth lye, and what words are most fit to use in the Articles given in this Cause.
2. What things are necessary and preparatory to be done, before this Action be begun, in a Cause of Temerary Administration.
3. The Tenor of the Sentence in this Cause.

When one *citra mortem testatoris*, gets Goods of the Deceased's into his Hands and Possession, then the Articles properly lye, in *Causa Temerariæ Administrationis*: When he had them, *ante mortem testatoris*, & *post mortem detinet*, then the Law presumes he had, and hath them, *ex traditione defuncti dum vixit*; and in that case, an Action of [Detinue] doth lye: And therefore, in this last case, you sue in a Cause of Temerary Administration, a Prohibition will lye; but in your Articles, use not the word [Detinet] but other words, [as *habet, occupat, &c.*] for Detinet will give ground for a Prohibition, more than the other.

2. Before these Causes of Temerary Administration are commenced, the Executor ought to shew to the Party who hath Temerarily Administer the Goods of the Deceased, the Will of the Deceased under the Seal of the Judge who approved it; likewise the Lawful Administrator ought to shew the Administration of the Deceased's Goods under the Seal of the Judge who granted it, that so it may appear to the said Party, that the same Goods are Lawfully Administred: And he must also call upon, and request the

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said Party to be Cited, to deliver him the Goods of the Deceased, which are in his custody, to the end that they may be Apprized and Inventoried; as also that the Debts and Legacies of the Deceased may be paid, and that the same may be administered by the Executor or Administrator, according to the Deceased's Will, and that the said Will may have its effect, according to the Testator's intention: All this the said Executor or Administrator must do, before Witnesses. If any who keeps these Goods without Lawful Authority, being requested on this manner, doth refuse, or doth unjustly defer to deliver them, then the Party grieved, may sue this Temerary Administrator, in a Cause of Temerary Administration of the Deceased's Goods; or rather he may Cite the said Party, to answer Articles touching his Souls health, and especially concerning the Impediment of the Execution of the Deceased's Will, and the Temerary Administration of the Deceased's Goods, to be objected at the promotion of the said Executor or Administrator.

3. The Tenor of the Sentence in these cases of Temerary Administration of the Goods, ought to be such or the like as follows, (*viz.*) That such an one is Executor or Administrator of the Goods of N. Deceased, and that all the

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* Lind. de te-
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Goods of the said Deceased, do fall under the said Administration, to pay the Deceased's Debts and Legacies, and that such an one, (*Scil.*) the Defendant doth keep some Goods of the Deceased's, † especially such and such [he specifies those Goods, which are proved to be Administered by the Defendant, whether by Witnesses, or by the confession of the Adverse Party] are Temerarily Administered by reason whereof the Executor or Administrator has been, and is so hindered, as that he cannot Administer the said Goods, and make an Inventory of the same, and pay the Debts and Legacies, (if it be the Executor who sues in this Cause) of the said Deceased, and prove the Will, and the said N. that is, the Defendant is to be pronounced to have incurred the Sentence of Excommunication * pronounced against these Persons, and that he is a Person who is Excommunicate, *ipso facto*, and as such is to be pronounced publickly, and he is to be condemned in Charge

But here it is to be noted, that the aforesaid Sentence pronounced in manner and form aforesaid, and the same being verbally Executed, the Judge is not wont to decree a Monition against this Temerary Administrator, for the payment or delivery of the said Goods, Temerarily Administred, but Publication or Denunciation being made of the said Sentence of Excommunication pronounced by Law, (in the aforesaid case) in the Parish Church of the Temerary Administrator: And if the Defendant doth persist in this Sentence of Excommunication, Forty days together, after the same is denounced, he is to be signified to the King's Majesty, and is to be Imprisoned upon the Writ, *de Excommunicato capiendo*, and is not to be absolved † until he restore those Goods, which he Temerarily hath administred and satisfied the Church for his Contempt, and pertinacious Contumacy; yet the Judge may proceed to Execution of the Sentence, as to the Charges, like as in other Ecclesiastical Causes.

† *Si absolut. fuerit valet absolutio non vocato Astore, sed Astore appellandum est. Specul. de contuma. Sect. nunc dicem. 4. n. 12. Boverfing. verb. Absolutio. n. 1. p. 367.*

C H A P. X.

The manner of Proceeding in a Cause of DILAPIDATION.

S E C T. I.

1. *Against whom the Cause of Dilapidation is to be commenced.*
2. *Of the Causes which excuse a Bishop, Rector or Vicar and their Executor or Administrator from being condemned in Dilapidations.*
3. *The manner of proving Dilapidations and the Ruins of the Premises.*
4. *The Defendant for his Defence, is to be admitted in a Cause of Dilapidation, to produce Work-men to inspect the Ruines mentioned in the Libel.*
5. *In what Case the whole Ruines are not to be allowed to the Incumbent.*

IF a Bishop, Rector or Vicar, suffer their Palace, Mansion, Churches, Chancel, Chappels, Houses, or other Edifices whatsoever (belonging to that Bishoprick, Rector or Vicarage, whereof they were lately Bishop, Rector or Vicar) to fall down; then the next Successor may Sue the Predecessor, in a Cause of Dilapidation or Ruin of the said Bishoprick, Rectory or Vicarage; and the Bishop, Rector or Vicar may Sue in the aforesaid Cause, against the Executors or Administrators of the last Incumbent, yet though the Dilapidations or Ruins, happened not in their times, but in the times of their Predecessors. The reason is, because those Executors and Administrators have the like Action against the Executors and Administrators of the Testator's Predecessors, and may recover the value of the Repairs against them; and if this Action be not thus commenced, they cannot recover Repairs otherways.

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2. If a Cause of Dilapidation is commenced against a Bishop, Rector or Vicar, in whose time the Dilapidations sued for did not happen; if the Bishop, Rector or Vicar, doth alledge and prove that these Dilapidations did not happen in the time of his being Incumbent, and that he for that space of time wherein he was Incumbent, (considering the yearly value of the Bishoprick, Rectory or Vicarage, and the Charges Incumbent about the same, together with the congruous and necessary Sustainment and Hospitality, which ought to be allowed him, according to his Dignity) hath expended and laid out a sufficient Sum about repairing the things named in the Libel, and that he who was Incumbent before him, (by whom the Premises were suffered to come to ruin) died so in debt, that he had not Goods at the time of his Death, which were sufficient to repair these Dilapidations: Or that the said last Incumbent, did Institute an Action against his Predecessor, in whose time these Dilapidations did happen, and that whilst this Sute did depend, this Incumbent dyed, leaving no Executors, being so much in Debt, as none durst or would administer, or enter to his Estate or Goods: Or that he did commence a Sute against the Executors or Administrators of the last Incumbent, and that they were freed by the Sentence of the Judge, upon their Plea of a *Plene Administravit*, and the insufficiency of the Goods: Or that he obtained Sentence against the Executors or Administrators, and that they were Imprisoned by vertue of the Execution of this Sentence, and dyed there, leaving no Goods, at least which were sufficient to pay the Dilapidations adjudged, and that he hath used all diligence possible, for the recovery of these Dilapidations.

3. So soon as the Bishop is installed to his Bishoprick, and the Rector or Vicar are inducted, they may procure Work-men, as (House-carpenters, Brick-layers, and the like) to inspect and view all the Buildings which are fall'n, or those which want repair, and they may write down for what Sum, every Work-man may and will re-edifie and repair the same; and then the Work-men may put their hands to this Paper, that they remember the same, when they come to be produced as Witnesses. For this Inspection

spection being made, the Bishop, Rector or Vicar may commence his Action when he pleaseth. That these Workmen may prove the intention of the Plaintiff, they ought to depose that such a Ruin cannot be sufficiently repaired or amended, for less than such a sum; neither would they (if in case they were to be hired to it) willingly repair these Ruins for a less Sum: And that this may make a full Proof, it is requisite that there be two Witnesses of each Craft, required in and about those Repairs; for one Bricklayer is not sufficient to prove what Brick work is required, nor is one Carpenter sufficient to prove what Timber is requisite, nor one Smith, what Iron is wanting, &c.

4. If the Plaintiff's Witnesses, produced in this Cause of Dilapidation, do depose (either in favour of the Party producing them, or because the Party producing them hath promised to set them on work to build up, and repair these Ruins) that these Ruins cannot be repaired without an excessive or great Sum (as the Defendant thinks it at least) the Defendant in this Case, may alledge this Excess, and may propound particularly, that such and such things Libelled, may be well and sufficiently repaired and amended, for so much, and such a Sum. And to prove these Alledgments, the Defendant ought to be admitted to produce Workmen, upon the Premises, to inspect all and singular the Ruins and Delapidations Libelled; and the late Bishop, Rector or Vicar is to be admonished to permit these Workmen to make search, and to inspect these Ruins, and also that he permit the Defendant or his Proctor to be present with them, if they think fit. Exceptions may be propounded against the Persons and Depositions of the Workmen, as well of the Plaintiff, as of the Defendant, and the Parties in Contest, may mutually reprove the Relation or Judgment of these Workmen, or others who are more skilful.

5. If the Bishoprick, Rectory or Vicarage hath been vacant, and destitute of a Pastor for three or four Years, or the like time, before the Installation of the Bishop, or the Induction of the Rector or Vicar, who intends to Sue in a Cause of Dilapidation; in which Vacancy, 'tis probable very many Ruins might happen; or if the Bishop, Rector

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or Vicar, doth not institute his Action in a Cause of Dilation, within some Years from the time of his Installation or Induction, nor hath taken care to get these Ruins inspected by Work-men, within so many Years, in which time it is very probable many Ruins might happen as before: In these cases, though the Bishop, Rector or Vicar have proved the aforesaid Ruins, when inspected (after so many Years) by the Work-men, did extend to such a Sum; he shall not recover the whole Sum, but only such a Sum is to be allowed, as the aforesaid Work-men shall judge, might probably happen, betwixt the time of the Living being vacant, and the time of inspecting the Ruins. Therefore the Defendant's Proctor ought to beware, in these Cases, that amongst other Interrogatories, which he Administers the Witnesses of the Adversary,) he do also Interrogate those Witnesses, to what, and how great Sum (in their Judgments and Art) the Ruins (of those things, mentioned in the Libel) which happened in the time of the Vacancy, or before the aforesaid inspection, might in all likelihood amount to.

C H A P. XI.

*The whole order and manner of Proceeding about
SEARCH made into the Records, kept by any
Register, &c.*

S E C T. 1.

1. *The Tenor of the Monition to exhibit the Records or Manuscripts, before Commissioners, in order to have them Searcht.*
2. *The manner of desiring a Search.*
3. *The form of Proceeding in the said Search.*
4. *The form of Drawing the Proctors Answer to a Allegation.*
5. *The manner of Exhibiting Instruments before the Judge, &c. See Part 3. Sect. 7. num. 4. of this Book.*
6. *The manner of Protesting against these Exhibits. See there numb. 5.*

THE Proctor who desires a Search, must procure the aforesaid Monition, and get it Sealed under the Seal of the Judge, and then get it Executed against the Person in whose custody these Records or Manuscripts do remain. And this Monition is to be Certified with an Authentic Certificate, (as in other Causes) before the Commissioners so soon as they sit in the Day and Place appointed.

2. If in any Registry or publick Office or Arches, any Instruments or Writings do remain, which make any way the proof of the Contents of the Libel, given in by the Plaintiff or the Defendant; the Party so having occasion for them, must alledge to the Judge, that there are divers Instruments or Manuscripts, (which he must specify if he can) which do necessarily make to the proof of the Contents of his Libel, or other matter, by him propounded and exhibited, and which remain in the Registry of

lick Office of the Reverend Father, *N.* (or any other Person, in whose custody they are, naming the said Person,) wherefore he must desire that a Search may be granted to *M. N.* and *O.* (Persons in Ecclesiastical Dignity) jointly and severally, to search the Rolls and the said Writings upon such days, in such a place, (which place is wont to be the place where those Rolls are kept) and that *N.* the Adverse Party, or rather his Proctor may be admonished to be present at this Search: Also that a Monition may be Decreed against the said Reverend Father, &c. or any other in whose custody these Manuscripts do remain, to exhibit the same, before the said Commissioners, on the day and place aforesaid, to the end they may be Searched: Which Petition and Monition, the Judge decrees as is desired. In the desiring and decreeing these Searches, some Years ago, an Errour (as *Mr. Clarke* accounts it) hath crept in; (*Scil.*) in as much as the Commission upon this Search, is requested and decreed to be fit upon in some Consistory, with a Monition to exhibit the Records before the Commissioners in that place, and not in the Registeries or Offices, where they are kept; seeing that of ancient time, the Manuscripts and Exhibits were wont to be kept in a publick place, particularly set apart for this purpose; and in this case, if the Original Exhibits, (mentioned in the Allegation or Commission, made or granted upon this Search,) be found by the Commissioners, Searching the Registry or Office, they will make much more proof, than if they had been brought by the Register, to any other place. For in case they be so brought by the Register, how can it be proved that these Exhibits or Manuscripts, alledged, were in the Office or Registry, and faithfully kept there? Truly no way at all; except only that the Register, and sometimes *Mr. Clarke*, when they exhibit the same, do affirm upon their Word, or their Oath, that they were so kept. Therefore *Mr. Clarke* believes it most safe for the future, that the Parties in Sute do take care, that all the Searches be made in the Offices.

3. When the Commissioners and the Notary are present, on the day, and at the place where the Search is to be

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2. If in any Registry or publick Office or Arches, any Instruments or Writings do remain, which make any way the proof of the Contents of the Libel, given in by the Plaintiff or the Defendant; the Party so having occasion for them, must alledge to the Judge, that there are divers Instruments or Manuscripts, (which he must specify if he can) which do necessarily make to the proof of the Contents of his Libel, or other matter, by him propounded and exhibited, and which remain in the Registry of

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3. When the Commissioners and the Notary are present, on the day, and at the place where the Search is to be

be made, the Proctor or his Substitute, (exhibiting his Substitution) must acquaint the Commissioners, that (on behalf of the Worshipful, the Official of the Beautiful Court of Canterbury, or some other Judge who granted the Search) he doth present unto them, the Letters Commissionall in order to make a Search; and he must desire that they will vouchsafe to take upon them, the Execution of this Commission, and decree that it may be proceeded upon according to the Tenor thereof. Then the Commissioners must cause the Commission to be publicly read; and having so done, they must say, 'Out of the Reverence or Honour we bear to the Arch-bishop, (if it be him who granted it) we take upon us this Commission, and do decree that it shall be proceeded upon, according to the force, form, tenor and effect thereof, and do take unto us this Notary here present, to be the Writer of our Acts in this behalf. Then the Proctor of the Adverse Party is to be publickly called; and they must proceed in all things, in Penalty of his Contempt, if he appears not, as is shown before, the Production of Witnesses upon a Commission, &c. If the Adverse Party or his Proctor doth appear, then if in case the Search be not to be made in the Office, the Party desiring the Search, must Exhibit the Original Mandate with a Certificate upon it, and must accuse the Contemner of M. N. and O. who were admonished according to the Tenor of the said Mandate, to exhibit on this day, and at this place, the Manuscripts mentioned in the Letters Commissionall: And then the Register or Keeper of these Manuscripts must say, on the part of N. (that is, the Judge to whom they belong) and on the part of me the Register or Keeper of the Registry, in order to satisfy this Motion, I Exhibit such a Writing, or such an Instrument, or such a Book, &c. and then the Party desiring the Search, must also Exhibit the said Writings, so far as they make on his part, and must desire that they may be diligently read, searched and inspected, and that true Copies thereof, may be transcribed and faithfully collated with the Originals; and that such Collation being made, they may be transmitted to the Judge, who granted this Commission, on the day, and at the place, and

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according to the Tenor of the aforesaid Commission. All which things, the Commissioners must do, and decree, in presence of the Adverse Party, and of the Notary Publick whom they took unto them, and they must Certifie the same, as the Commission (granted for examination of the Witnesses,) is to be Certified. But as was said above, if the Adverse Party doth not appear, neither by himself nor his Proctor, then all things are to be done, exhibited, and decreed, in Penalty of the Contempt of the said Party, being called, accused and pronounced as Contumacious, &c. And if the aforesaid Search be made in the Office, where the Records are kept, then the said Commissioners, in presence of the Adverse Party (if he be present) or Penalty of his Contempt, (if he do contumaciously absent himself) must make the aforesaid Registry be Searched, (the Manuscripts mentioned in the Commission, being produced in presence of the said Notary, whom they have taken unto them,) and they ought to proceed and certifie, as above. But in these cases, the Register or keeper of the said Manuscripts, for the better dispatch of this Search, is wont to shew the Commissioners the said Manuscripts, or the place where they are wont to be put and kept. But it may be enquired here, how and in what manner they must proceed, if the Bishop or Register being admonished (as above) to exhibit the said Manuscripts, before the said Commissioners, do not appear, nor satisfie this Monition? (*viz.*) Whether or no they can be Excommunicate for this their Contempt, by the said Commissioners, or otherways an Authentical Certificate being made by these Commissioners, to the Judge who grants the Commission, to acquaint him of all things acted and done by them,) the said Judge may proceed against these Contemnors, in a Cause of Contempt, and may punish them by the Ecclesiastical Censures? It has been very much controverted and disputed about this Question, thirty years ago, amongst the most skillful Advocates; but Mr. Clarke doth not remember how it was decided. But the most experienced Practitioners, are of this Opinion, (*viz.*) That the said Commissioners should not Excommunicate the Bishop or Register, though they were admonished (as above) to exhibit the said Manuscripts;

manuscripts; seeing that in the Commission granted for this Search, there is not given, (at least it is not usual to give) any power, (either expressly or in equipollent terms) to Excommunicate the Parties in not exhibiting the said Manuscripts. To avoid this Question therefore, for the future let the Proctor who desires this Search, take care that in the said Commission, there be power granted to the Commissioners, to Excommunicate the Parties being admonished, and not exhibiting these Manuscripts; which Clause or Power, was not wont to be inscribed or inserted, for many years together.

4. The Answers of the Proctor, (whereof mention is made before) ought to be drawn in Writing, and that in the first Person, (*viz.*) The Answers of me N. the Proctor of M. made to the Positions of the Allegation and the Exhibits, given on the part of O. on such a day. And then I answer thus to the Allegation and the Exhibits, and I believe according to the truth, and as a Proctor is bound to believe the truth in his Conscience. And if the Allegation or Matter, whereto he is to answer, is in Articles, he ought to answer respectively to every Article: If there are diverse Instruments exhibited, the Proctor ought to answer particularly, (by the words I do, or I do not believe) to every part of the Allegation, and to every Exhibit severally; for a general Negative Answer (which is frequent now adays, without inspecting those things, which they answer) is not to be admitted, by the style of the Court, though they answer by these words, [to such an Allegation, and to the Exhibits mentioned in the said I answer, that I do not believe the same to be true in any part.]

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C H A P. XII.

*The manner of Proving WILLS in SOLEMN
Form of LAW.**For the manner of proving Wills in common form,
see ante II.*

S E C T. I.

1. *The form of comparing Letters, which are commonly had and made in the Prerogative Court, in order to prove the Testator's Hand.*
2. *The manner of Proving a Will, in a Court of Controversy, that Sentence may be pronounced for the validity of it, though no Witnesses were present at the time of making the same.*

IF it is contested, whether the Will in dispute be written or subscribed with the Testator's Hand or not, or whether or no any Instrument, (as Indentures, Leases and Bonds, which are for the most part, incidently, and not principally exhibited, to prove the intention of the Plaintiff or the Defendant) were writ or subscribed, with the proper Hand-writing of the Persons named in the same. If they who are Witnesses to the Will or Instrument, are dead, or were not produced as Witnesses, before this Sute was begun: Yet if the Party hath other Writings, (though altogether impertinent to the Cause instituted) under the Hand of the Testator, or other Persons, named in those Exhibits, and also Witnesses who can depose that they saw the Testator, or the aforesaid Parties subscribe this Writing, &c. then the Proctor must exhibit those Writings, in supply of the proof of the Contents in the Allegation made upon the Will, or other Writing, and must alledge these words, (*Scil.*) the words contained in those Exhibits, so given in supply of the proof of the Contents, and that the Name and Sirname of the Testator, (or other aforesaid Persons) was and is writ with the proper Hand writing

of the Testator, or Persons aforesaid, (*viz.*) with that same Hand, wherewith the Will, or other the aforesaid Exhibits, given in the first place, were and are writ: And this Allegation is to be propounded jointly and severally, and is to be admitted as in other Causes: And Witnesses are to be produced upon these Alledgments and the Exhibits; and the Depositions being published, if the Party exhibiting the Premises, doth prove those things alledged, the Proctor must alledge, that his intention, mentioned in the Allegation, by him exhibited and given in, on such a day, is sufficiently founded by the Exhibits and Depositions of the Witnesses, by him given in, and produced in the second place, referring himself to the sayings and depositions of those Witnesses, and to those Exhibits respectively, and to the Laws: And therefore he must desire that comparison may be made betwixt those words (specifying the words which the Witnesses Swear, were writ by the Testator, or the aforesaid Persons) and those words, (specifying the words which were alledged to be writ by the Testator, in the Writings first exhibited) and that Persons skilful in the Art of Writing may be chosen, and Sworn, faithfully to compare the Premises, and to return their Judgments against such a day. Then the Judge, if it appears to him, that the aforesaid Writings, (which were last of all exhibited, in order to prove the former) were subscribed by the Testator, or other Persons mentioned in the first Exhibits, he must decree that a Comparison shall be made, and that in order thereto, *M. N. O. and P.* (that is, four or six of the eldest and most skilful of the Proctors best skilled in the Art of Writing) shall be Sworn faithfully to compare the aforesaid Exhibits respectively, and to return their Judgments against such a day. The Party who desires this Comparison, must take care that the Comparators do meet together for this purpose, in some place different to both Parties: And must also take care that the Register be present, to shew these Comparators all the Exhibits, and the Act made upon the Decree of the said Comparison; that so it may appear to them, upon what things they are to make this Comparison: And it is also lawful for the Adverse Party or his Proctor, to be present at the

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Comparison, and to inform the Comparers, out of the Acts or the Exhibits themselves, the dissimilitude or variety of Hands or Characters, in the respective Exhibits. If the Comparers do find by this Comparison thus made, and do return their Verdict, that the said respective Writings, (*viz.* those which were exhibited the first and second time,) are one and the same Hand-writing; then they ought to return their Judgment or Verdict so, (by virtue of their Oath, upon a day assigned for this purpose) in Writing, with a Subscription of their Hands, to this Relation respectively: And the Party desiring this Comparison, ought to exhibit this Relation, as a supply of the Proof of the Contents, mentioned in the Allegation and the Exhibits given in, in the first place; but the Proctor of the Adverse Party may dissent and protest as to the nullity thereof. If the Comparers (upon diligent comparison of the Premises) do find that the aforesaid Writings are unlike, and not writ with one and the same Hand, this their Verdict must also be returned, in like manner as the other, and the Proctor of the Adversary may accept this Relation, on his and his Client's part.

† Michael.
Grassii Thes.
communis opi-
nio. Sect. Te-
stamenta. q. 12.
19. Mascard.
de probation.
verb. Testa-
ment. conclus.
1352. n. 70.
Swimb. part. 7.
Sect. 12. n. 4.
2, 10. Simo de
prat. d. inter-
pret. ult. vo-
luntatis. lib.
1. fol. 195.

* Mantica de
conject. ultima
voluntat. l. 6.
T. 2. Swimb.
par. 1 Sect. 14.
Mich. Grass.
Thesaur. ubi
supra q. 86. n.
11.

2. What as is here said, concerning Wills writ by the Testator, no Witnesses being present, &c. is quite out of use, and abrogated by a late Statute, in CHARLES the Second; however I shall insert the Proceedings in this case for form sake. Sometimes it falls out, that the Deceased being of perfect mind and memory, doth write his Will with his own Hand, or perhaps doth order another to write it, and doth subscribe it himself, and doth dye before he doth publish and acknowledge the same before Witnesses: Yet if in this case, the Testator being dead, the Executor is called to prove this Will by Witnesses, if the said Executor can prove by two † sufficient Witnesses, that the said Will was immediately, (or at least so speedily, as that it could not be writ or forged, betwixt the Testators death, and the time of finding the Will) found in a Chest, Cup-board or Desk of the Testator's, *in which other Writings of great moment, are wont to be kept: And if also the Will do appear by Comparison, (made as was before directed) to have been writ or subscribed with the Testator's

(*) *Mynf.*
Inst. Testator
testans Sect.
sed cum paula-
tim. n. 15. We-
semb. ff. T. de
Testam. n. 10.
Tiruquel. privi-
leg. pia Cau-
sa. 12.

† *Mynsing.*
Inst. T. de Te-
stamentis ordi-
nand. Sect. sed
cum paulatim.
n. 12.

tor's own Hand, the Judge must pronounce for the validity of the Will. Mr. Clarke has known it often thus adjudged, at least if the Will were a Will to pious uses. Likewise if one Witness doth depose as to the making of the Will, upon his certain knowledge, and it doth appear by Comparison of the Letters, &c. that the same was writ or subscribed with the Testator's own Hand; these two half proves are sufficient grounds, for the Judge to pronounce for the validity of the said Will. But we must understand it to be a Will, amongst Children, (*) or to pious uses, which has this privilege. Also if two Witnesses do depose, that the Testator in their presence, did confess that he had made his Will; though he doth not declare the Contents of it, † nor in whose custody it is, or in what place it is; if it doth appear by Comparison, that the same is writ or subscribed with the Testator's own Hand; and if this Will were found in a Chest of the Testator's, as above, though not immediately, but some days after, yet this Will is valid, at least in the aforesaid pious Causes, or amongst the Deceased's Children. Mr. Clarke has seen it often adjudged thus.

C H A P. XIII.

The whole Order and Manner of Suing a COMMUNITY in these Courts, as a College, Dean and Chapter, &c.

S E C T. I.

1. *Of a Citation against a Dean and Chapter; the Master, Fellows and Scholars of a College, or any other Community.*
2. *The manner of giving the personal Answers of a Dean and Chapter, the Master, Fellows and Scholars of a College, and other Community to the Positions of a Libel.*
3. *The Form of answering to the Positions of the Libel by virtue of a special Proxy.*
4. *The Form of exhibiting the Answers by virtue of a special Proxy.*
5. *The Protestation of the Prottor of the Adverse Party, at the time of the Exhibition of this special Proxy and the Answer.*

IF any one hath any Action for a Legacy, or the Subtraction of Tithes, or the like Causes, against a Dean and Chapter, or a Master, Fellows and Scholars of a College, or any other Community; who by reason of the multitude, cannot be easily convened or cited, (at least personally) a Citation is to be drawn in these cases, on this manner, (*Scil.*) that ye cite the Worshipful N. Dean of the Cathedral Church of M. and the Chapter of the said Church, [or thus] N. the Master and the Fellows and Scholars of the College of M. [or thus] the Major and the Community of the City of London, by affixing these presents, upon the Doors of the Chapter-house, where the Dean and Chapter are wont to sit: Likewise upon the outer Doors of that College, whose Master, &c.

is sued : And so likewise against the Major, &c. by affixing the same, upon the Common-hall, or place where they are wont to keep their Court, (which is called the Guild-hall) and where the Citizens and Aldermen of the said City are wont to have recourse ; these words, or some such like, being added in every Citation, [by such ways and means, so as in all probability the Parties to be cited, may come to the knowledge hereof.] Yet the Parties who commence Sute against these Persons, out of civility to them, are wont to intimate this Citation, (before the Execution of it) to the Dean, or some one or other of the Chapter ; as also to the Master of the College ; or the Major or Recorder of the City ; and must signifie that they intend to commence this Sute against them ; and if notwithstanding this Intimation, this Community doth not appear by their Lawful Syndick, upon the next Court day, to answer the afore- said Sute, then may this Citation be Executed in manner as was before directed. A Syndick † is he that hath a Mandate from a Dean and Chapter, or other Community, to manage Sutes and other Busineses, and sometimes to constitute a Proctor, exercising in that Court, where the Action is commenced : These Persons may also constitute this Proctor to be their Syndick. And it is to be noted that in every Citation, the afore- said respective Persons are not to be Cited to appear personally, as in an ordinary Citation, but they are to be Cited to appear by their Syndick, sufficiently instructed and constituted : For a general or usual Proxy is not sufficient as to these Persons.

2. If the Plaintiff in any Cause, relating to the afore- said Persons, doth desire to have the personal Answers of those Persons, to the Positions of the Libel, &c. it must be decreed for the principal Parties, that they appear upon such a day, and in such a place, by their Syndick, sufficiently instructed and lawfully constituted, to answer to the afore- said Positions, by vertue of the Oath of the afore- said Persons. And against the day of this appearance, the Parties thus cited, ought to appoint a Syndick with a special Proxy, to answer (by vertue of their Oath) to every Position of the Libel, as is more fully declared, in the following number : For though the Proxy (before mention-

† Wesemb.
parat. ff. tit.
quod cujusq;
Universitatis,
n. 3. Alciatus
in prax. fol. 56.
a graco verbo
συνηκτων,
id est, adesse,
patrocinari,
defendere.

be authentick, yet it is not sufficient to these Effects: And if the Parties thus cited, do not this, they are to be Excommunicate, as well as any other Persons, by those general names, (*viz.*) the Dean and Chapter, all and singular, &c. and so likewise the other Communities before mentioned.

3. If a Bishop, Dean and Chapter, Master of a College, Fellows and Scholars of a Community, or any other eminent or privileged Persons, are called to answer personally, they ought to send their special Proctor, * or any other Syndick, who has a special and an authentical Proxy: ** Nonne hic Actor de quo fit mentio a Wesemb. ubi supra n. 3. litt. E. qui distinguitur a Syndico, ut ibi dicitur. Speculator par. 3. tit. de Actore a tutore vel Syndico datur Actor.* For to this end and purpose, only a special Proctor can be admitted, (notwithstanding what was said before, touching their Syndick, or general Proctor exercising in the Cause,) to answer to their Names, (and in their Conscience,) to Swear to these Positions. But in this Proxy, not only all and singular the Positions, to which they ought to answer, is to be inserted, but also the several and distinct answers, to every such Position, by the Words I do, or I do not believe: Or else this Answer avails not, neither is it a full and sufficient Answer.

4. This Proctor thus constituted, must exhibit this special Proxy saying, I exhibit my special Proxy for B. and I make my part for the same. And in the name of my Client, I do answer and believe in and through all things, as is contained in the said special Proxy; and in the Conscience of my Client, I do Swear upon the holy Evangelists, that these Answers are true, according to the Information of my Client, and the credulity of his Proctor, in those things which concern the Fact of another, and the proper knowledge of my Client himself, in those things which concern his own proper Fact.

5. At the time of exhibiting this special Proxy and the answer, the Proctor of the Adverse Party, must say that he will accept the Contents of the Proxy, and the Answers, in far as they make on his and his Client's part; but if they make against him in any thing, he dissents and protests as to the nullity and inauthenticity thereof: And he must allege that it is not fully nor sufficiently answered, referring himself to this Proxy, the Answers, and to the Laws. And then if the Day of Appearance of the said Party who

who is to give the Answer, is in being, (whether by the Certificate introduced, or continued until that day, or the Penalty being reserved,) the Proctor who desires the Answers, must exhibit the Original Mandate, &c. and desire that the Party may be Excommunicate, &c. If these Answers are not Authentick, through the Defect of the Authentical Proxy, or if the Laws permit not the Answers of the Proctor, or if the Answers are frivolous, and (supposed they be) made with an intent, unjustly to defer the Sute, or sometimes with an intent of making a frustratory Course (defeating Justice as it were) if these things are made appear to the Judge, the Party is to be Excommunicate notwithstanding the aforesaid Answers. But observe, that if the Judge doth deliberate upon this Petition, (*viz.*) whether the Answers are to be admitted, or the Party giving them, is to be Excommunicate; the Certificate of the said personal Decree is to be continued until that day, which the Judge doth assign, to hear his Pleasure; for otherway the said Mandate being discontinued and withdrawn, the Party answering cannot be Excommunicate, but ought to be Cited *de novo*, to the Effect, as at first.

THE
PRACTICE
OF THE
Ecclesiastical Courts.

THE SEVENTH PART.

the whole Order and Method of Proceed-
ing in Criminal CAUSES, which are
liable to be Corrected and Reformed by
the Spiritual Magistrates.

The Rubric.

BY the Common Law, † the Punishment and Cor-
rection of Crimes, doth belong to the Reverend
the Bishops and their Vicars in Spiritual things.
Therefore every Bishop, (in order to correct and
with those Crimes, which are to be corrected and punish-
and to extirpate those Errors which are to be rooted
in the first Year of his Inthronization, (that is, af-
ter his Consecration and Installation to the Bishoprick) is
to visit personally, as well in the Head as the Mem-
(that is, as well the Cathedral as the Collegiate, and
Parish

† *Lind. c. de
Consuetud. Sect.
Statuimus ver.
inquirere.*

* *Lind. ubi su-
pra verb. vel
hios. &c. de
Officio Archi-
diac. verb. vi-
sitatione.*

Parish Church) and the Clergy and People of his whole Diocese, and the whole Congregation committed to his charge. He is wont also for some Causes, to exercise like Visitation, once in every three Years. But seeing Bishops are commonly resident in the City of their Diocese and are wont to have a special care, as to the Manners and Religion of the Citizens and the Inhabitants there, as they cannot conveniently visit the whole Diocese every Year: And lest the Crimes of the other Diocesans should remain unpunished, and that the Errors and Heresies, any has crept in) should be extirpated, the Arch-deacons (who are called the Eyes of the Bishop) * are bound, and are wont to visit (Personally, or by their Officials) the Arch-deaconry every Year, and are wont to reform and correct the Crimes and Errors therein hapning. And though by the Law, the correction and reformation of Crimes, (the greater at least) doth not properly belong to the Arch-deacons (as was said before) but to the Bishops: Yet (either by some Commissions and Commissions, had and made between the Bishops and their Arch-deacons formerly, or by Prescription) the correction, reformation and punishment of (even the greater) Crimes doth belong to every Arch-deacon of every Diocese within the Province of Canterbury, yet the Bishop and the Arch-bishop are not excluded, but they may (whenever Complaint is made to them, concerning any Ecclesiastical Crime,) proceed of their meer Office, or when it is moved against all manner of Delinquents, and may correct their Crimes.

CHAP. I.

The manner of Proceeding against Offenders by way of
INQUISITION.

SECT. I.

1. What Inquisition is, and how manifold.
2. In what Cases, and how a Citation is to be decreed upon an Inquisition.
3. The manner of Executing and Certifying a Citation, upon an Inquisition.
4. The manner of proceeding, if the Party Cited doth appear.
5. The form of proceeding against the Offender, being Sworn to answer to Articles, and refusing to answer to some Positions, to which he is bound by Law to answer.
6. The manner of proceeding against the Offender, denying to answer to a Criminal Person, although the Fame be proved or confessed.
7. The manner of proceeding against the Offender, who denies the Crime, but confesseth the publick Fame.
8. The manner of proceeding, where the Offender denies both the Crime objected, and the Fame.
9. The Tenor of the Interrogatories, to be administred against the Witnesses produced in a Cause of Correction, whether to prove the Crime, or the publick Fame.
10. Of the final Determination of the aforesaid Cause, and the Pronunciation of the Sentence.
11. The form of putting Sentence in Execution.
12. The Tenor of the Absolutory Sentence, to be pronounced for the Party accused, if the Judge or the Promoter, do make default in the Proof of the Articles.

There

† *Alciat. in. prax. plenius de his ubi omnia reperias ordine (quo ad processus) respective dicta.*

THere are three ways of Proceeding upon Ecclesiastical Crimes, † as Mr. *Clarke* hath heard and practised (*Scil.*) by Inquisition, Accusation and Denunciation. The first of which is here spoke of. Inquisition is the search out of some Crime, made by the Superior, in respect of those who are subject to his Jurisdiction. But it can regularly be made, except a Fame or Rumor is not abroad, and that by Persons of Credit. It is therefore

(*) *Alciat. ubi sup. de Inquis. fol. 213. Joann. Anan. super 5. decret. de Accus. in rubric. & Sect. Licet. & Sect. qualiter.*

(*Scil.*) 1. Absolutely General, (*) in as much as it respects the Persons and the Crimes; as when the Magistrate doth enquire, whether or no there are any Wicked Men. 2. Absolutely Special: As when the Magistrate enquires upon a certain and determinate Crime, against a certain Person. 3. Both General and Special jointly, (*Scil.*) General as to the Persons, and Special to the Crimes.

2. If it comes to the Ears of the Bishop or the Archcon, (whether by publick Fame, (†) or the Relation of some Persons of Credit) that any one within his Diocese or Arch-deaconry, hath committed some notorious Crime, or doth obstinately persist in some erroneous Opinion, perverse Practice, or is suspected so to do. Though if a Crime has not been detected or presented by the Churchwardens or Inquisitors; the Bishop or Arch-deacon may cite the Offender to appear personally before him, in his wonted place of Judgment, and not in private Houses (because the Law ought to be executed publickly) to answer certain Articles, touching his Soul's health, and especially concerning such a Crime, (here the Crime is to be specified) to be objected against him.

(†) *Johan. Anan. ibid. Sect. qualiter in fine. & Sect. cum oporteat.*

3. Though sometimes the Bishops and Arch-deacons in Criminal Causes, are wont to cite Persons, not by Citations in Writing, under their Seals, and in their Names, but by their Apparitors or Mandatories, by word of mouth. Yet it hath often been controverted, whether or no such Citation made thus, *viva voce*, doth avail, not being made in Writing, and whether or no the Party so cited, can be Excommunicate, (if he appears not) by the Judge, without a grievance being inflicted? To avoid this doubt

fore, it is requisite that for the future, they be cited by a Citation in Writing, * in manner aforesaid. Likewise the Bishops and Arch-deacons were wont (no Primary Citation preceding, and no Inquisition being made for the Party to be Cited, nor any Certificate being returned or brought in upon the Inquisition, neither any Proof made that the Party to be Cited doth abscond, so as he cannot be Cited personally) to decree that the said Persons should be Cited by publick Edict; and also (as Mr. Clarke has practised; and which seems more disagreeable to the Law,) the Apparitors were wont to leave at the House of the Parties to be convened, a little short Note or Paper, in which was contained only the Name and Surname of the Party to be Cited, and the day of his Appearance, the Cause for which he was to appear, being omitted, and if that Party so to be Cited did not appear, (though no Oath were made by the Apparitors, that this Note was left) they were wont to Excommunicate them, and get them denounced as Excommunicate Persons: From which sort of Proceedings, many Causes of Appeal were wont to arise, and the Parties Appealing have got the Victory. Therefore it is most safe for the future, that a Primary Citation be granted, and that the Party be Cited personally, if it can be done, or else (an Authentical Certificate, or an Oath being made, that the Party to be Cited doth so abscond, as that he cannot be Cited personally,) a Citation *his & modis*, is to be decreed: Which being duly executed and returned, if the Defendant doth not appear, he may be Lawfully Excommunicate, and they may proceed against him, as in other Causes of Instance.

* Jo. Anan:
super s. De-
cret. de Accus.
c. qual. &
quando. Sect.
Debet igitur.

4. The Citatory Mandate being returned, and the Party Cited appearing, the Judge, Bishop, or Arch-deacon, or their Official, may of their mere Office, give and oblige Articles in Writing against the Party appearing, concerning as well the Causes of his Convention, as the publick Crime about that Crime, for which he is Cited, and may compel the said Party to take his Oath, to make answer to the truth in his own proper Fact, and as to his credibility in the Fact of another: And if he doth contumaciously refuse this Oath, he is to be admonished a first, a se-

† Anan. ubi
supra Sect. qua-
liter, quæ sunt
differentia in-
ter Inquisitio-
nem ex officio
& per promotio-
nem officii factam.
Ant. de cohab.
cler. c. ultra,
col. 25. versic.
ad quantum
vento.

cond

cond and a third time (though all at one and the same moment) to take the Oath; and if he is yet pertinacious (or rather contumacious) in not taking the Oath, or in justly deferring to take it, he is to be Excommunicate, for this his manifest Contempt, and is not to be absolved, until he take the Oath to answer, to obey the Law, and to stand to the Mandates of the Church: If the Party then convened, doth take the Oath, to answer to these Articles, he is to be admonished to undergo his Examination upon the same, within or before some day, to be assigned for that purpose, at the pleasure of the Judge, or else to appear upon that day, and see himself Excommunicate, for his Contempt in that behalf; and if he doth not undergo his Examination before the time assigned, (whether he appears then or not,) unless he purgeth this his Contempt by alledging some lawful Causes, he is to be Excommunicate for his Contempt and Contumacy, as above.

5. Although, as was said above, the Defendant is not obliged to answer to a Criminous Position, yet he ought to answer to the Fame, and to the Jurisdiction of the Judge. For the Judges are wont to alledge in their Articles, that the Defendant is of their Jurisdiction, that the competency of the Court may appear. Therefore if this Defendant doth refuse to answer, he is to be requested, bid and commanded to answer instantly; and if being thus requested and commanded, he doth not answer, doth answer frivolously, or doth unjustly delay to answer, he is to be pronounced Contumacious, and in Penalty of this his Contempt, he is to be pronounced and declared confessing those Articles, to which he doth not answer. And this Pronunciation or Declaration, *pro confesso*, *æquipollent*, to a confession absolutely made, and the Defendant may be proceeded against, as if he had confessed those Articles, to which he hath refused to answer; or as if they had been sufficiently proved by Witnesses.

6. If the Defendant doth confess the Fame, or if it is sufficiently proved by Witnesses, the said Defendant ought to answer to the Positions, although they be Criminous; and if he doth refuse, or doth unjustly defer to answer, he is to be requested, admonished and commanded to answer

and if notwithstanding that, he doth not answer, he is to be pronounced *pro confesso*, in manner and form as above.

7. If the Defendant doth confess the Fame, but doth deny the Crime objected, and if the Judge and the Promoter of his Office do believe, that they can prove the Crime, a Competent Term is to be assigned to the necessary Promoter of the Judge his Office, to prove the Criminal Articles, and Proofs are to be produced as in other ordinary Causes, and the Defendant is to be admonished to be present at all the General Sessions, until Sentence be pronounced inclusively: And if he doth not appear, the Proofs and the Witnesses are to be received, admitted, sworn and examined, and their Depositions are to be published (upon those Articles objected) in Penalty of his Contempt: Also Sentence may be pronounced in his absence, or rather notwithstanding his Contempt. But it is most safe after the Attests of the Witnesses are published and received, that the Defendant be cited anew, to hear the Definitive Sentence pronounced upon such a day. And the Defendant may except against these Witnesses, and reprehend them and their Depositions; or he may before Publication of the Witnesses, propound and prove any sort of matter for his defence, and in order to prove his innocency, as to the Crimes objected: If the Fame is confessed or proved, he may be enjoined Purgation, as in the following Number. And it is to be noted, that all Causes of Correction, instituted of the mere Office of the Judge, are Summary Causes, at least, they are wont to be a Summary proceeding; but it is otherways, where there is a voluntary Promoter assigned.

8. If the Defendant doth deny both the Crime and the Fame, then if the Crime objected be notorious and publick, and if a publick Voice and Fame hath gone abroad concerning the same; the Judge must take care to produce and examine the Parishioners of the place where the Defendant lives, or any others to prove this Fame, and may compel them to give their Testimony; which if they refuse, he may punish them by the Ecclesiastical Censures. And like as in Causes of Instance, it is Lawful for the Party against whom the Witnesses are produced to administer

any Interrogatories, against the Witnesses of the Adversary, which are pertinent to the Cause Instituted, in order to bring the truth to light: So also in these Causes of Correction, in which the State, Esteem, good Name and Fame of any Man, doth depend amongst the good and grave sort of People, it is very requisite and convenient, that the Defendant do administer Interrogatories, against the Witnesses produced of the Office of the Judge.

9. Seeing that the Witnesses examined to prove the publick Fame, through the ignorance of the Register, are wont sometimes to depose generally, that a publick Fame hath gon abroad, that the Defendant hath committed the Crime objected, not mentioning by what Person the Fame rose, or from what Causes it had its Original; neither reciting any Reasons for their knowledge in their Depositions; the Defendant therefore may minister these following Interrogatories, (*viz.*) First, against the Persons the Witnesses, as above; then he may desire that the Witnesses may specify those Persons, from whom they hear the Fame; as also that they may declare particularly, the signs or presumptions, from whence this Fame took its rise, which may be these, (*Scil.*) if the Defendant has been seen in the night time, in suspicious places, with some suspected Bawd or other Infamous Woman, and often conversing with her in private, and kissing her. And if it appears either by the Witnesses Answers to these Interrogatories, or by the Proofs to be produced by the Defendant, that the Fame of the Crime objected, hath proceeded, from and been noised abroad by malevolent Persons, and such as are enemies to the Defendant, or (which often falls out) by the nude and sole Accusation of some naughty Woman who confesseth her own Naughtiness. To these Criminal Positions, the Defendant is not bound to answer, nor ought he to be accused of them: because a Fame thus generally proved, is not said to be proved properly, neither is it a Fame, but rather a false Rumor.

10. If the publick Fame, touching the Crime objected is proved, either by the Defendant's confession, or by Witnesses, or if the vehement presumptions and signs before noted, or such like are proved, though the Crime

jected is not proved, yet the Judge † may enjoin Canonical Purgation to the Defendant, and if the Defendant makes default in his Purgation, he is to be pronounced as convict; and publick Penance is to be enjoined him. But if the Crime objected is proved, then they must proceed to Sentence, and to a conclusion in the Cause, as in other Summary Causes, and the Definitive Sentence is to be pronounced, whereby the Judge or the necessary Promoter of his Office, (if a necessary Promoter were assigned) hath proved their intention mentioned in the Articles objected; and that the Defendant hath not proved any thing, to frustrate the intention of the Office, as in ordinary Causes; and in the conclusion of the Sentence he is to be pronounced to have committed the Crime objected and pronounced upon such a day, by reason whereof, he is to be Canonically punished, chastised and corrected, and a Saluta- and Condign Penance is therefore, and ought to be by Law enjoined the Defendant, and he is to be condemned to Charges, made on behalf of the Office, or its Promoter, with a Reservation of the Taxation thereof, as in other Sentences.

† Jo. Anan.
super 5. De-
cret. T. de Ac-
cus. Sect. Olim:
penult. statim
post probationes
proced. ad Sen-
tentiam.

11. Sentence is to be put in Execution, and Penance is to be enjoined the Delinquent or Party convict, and it must be proceeded in all things, either in the presence or absence of the Party detected in the same manner, as is shown before, where the Sentence is put in Execution, especially in a Cause of Defamation.

12. If neither the Crime objected nor vehement Suspicions and Presumptions of the Crime objected be proved, Sentence is to be pronounced for the Defendant, to solve him from those things related in the Articles objected, and he is to be restored to his former Fame and Credit, (in some measure injured by this Sute) and he is to be dismissed from the Office, as to things objected, with his Charges.

C H A P. II.

The manner of correcting Criminals by way of A
C U S A T I O N †.

† *Quanam sit
differentia in-
ter Accus. &
Inquisition.*

*vide Jo. Anan,
ubi supra T. de
Symo. Sect.*

Dilectus filius.

Accusatio sive

Accusare, est

aliquem in Li-

bello, reum cri-

minis deferre

vel facere ad

windictam.

Hostiens. de.

Accus. in Sum.

Alciat. in prax.

eod. tit. fol.

202. qualiter

procedatur in

Accus. ibi re-

perias, ad fol.

u/q; 210.

S E C T. I.

IF any hath committed any Crime, (whereof the Spi-
tual Courts have Cognisance) and is not detected, de-
nounced or presented for the same, or if the Bishop
Arch-deacon, have not proceeded against him, by way
Inquisition: Yet any Person, (who offers himself ready
pay the Party to be convened his Charges, if he doth not
prove the Matters objected,) hath interest, voluntarily
implore and promote the Office of the Judge, and may
call the Delinquent to answer Articles, and may adminis-
ter Articles to him, when he appears in the Name of the Judge
and of his Office promoted, and may accuse the Delin-
quent. And seeing a Cause of Correction voluntarily pro-
moted, is a Plenary Cause, it must be proceeded in, as in
other Plenary Causes, and the Defendant in these cases
(except certain Causes, such as are Causes of Symoniacal
notorious Usury and Incest, and all Causes concerning
the privation or deposing a Clergy-man from his Benefices
and Orders,) ought not to answer to the same, because
they are Criminous Positions; yet ought he to answer to
what he believes, touching the publick Fame, and it must
be proceeded in all things, in like manner, as upon
Inquisition. And the Parties may reply and give to the
Double Pleas, as in other ordinary Causes; and Sentence
is to be pronounced for the Plaintiff, or against the Plai-
ntiff, and for the Defendant, as before. But here observe
that if the Plaintiff in this Case, doth prove the publick
Fame or vehement Presumptions, so as Purgation may
be enjoined the Defendant, (though he proves not the Cause
objected) yet he shall obtain Sentence, that Purga-

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ought to be enjoined, and the Defendant is to be condemned in Charges of Sute: For by his denying the Fame, he hath caused the Plaintiff to contest, and be put to Charge about the proof of it.

CHAP. III.

The whole Order and Manner of proceeding against such as are presented by CHURCH-WARDENS; which is termed a PROCEEDING by way of DENUNCIATION.

SECT. I.

1. *What Denunciation is, and how manifold.*
2. *The order of Electing, Visiting, and Swearing Church-wardens, and the manner of Administring Articles of Inquiry to them, and an Oath thereupon, with the form of Drawing their Presentments or Denunciation upon those Articles.*
3. *The form of proceeding against those Persons thus presented and detelled by the Church Wardens.*
4. *The Tenor of the publick Edict, sent forth against those Persons, and the manner of executing and returning it.*
5. *The form of the Defendant's appearing with his Compurgators, and the Oath to be administred to him and them.*
6. *The order of Objecting against the Compurgators.*
7. *A Caution to be observed, both by such as are Accusers, and also by the Church-wardens or Inquisitors,*

† De Denun-
ciatione.

* Alciat. de
Denun.

† Jo. Anan.
super 5. decr.
de accus. c. si-
cut olim.

* Oeconomi
dicuntur a
græco verbo
οἰκονομῶ, 
id est, dispensa-
tor Alciat. ubi
f. fol. 57.

DEnunciation, according to *Hostiensis*, † is a relating or transmitting any Crime, to the knowledge of the Judge (Lawfully made without Inscription) in order to exact Penance, or impose any Lawful Penalty, &c. and it is either Evangelical, Judicial, * or Canonical, the last of which, is that here meant of; the which is either special, general or regular. See *Alciatus* in his Practice.

2. In every Parish within the Province of *Canterbury* (time out of mind) the major part of each Parish, together with the consent of their Rector or Vicar, are wont every year, to elect two discreet and honest Men † of the Parish, to be their Guardians* or Church-wardens, as they term them; yet some of the Parishioners would have the Election and Constitution of these Persons to belong solely to themselves, the Rector or Vicar being excluded by an ancient, (or rather a corrupt) Custom: And that themselves are wont to elect and constitute six, four, two, or more or fewer honest Men, to be Curators or Inquisitors whom the Bishop or the Arch-deacon, (intending to visit) do call to appear in their Visitation, and to undergo the their Visitation, and at the time of their appearance, they are wont to administer Articles of Enquiry to them in Writing; upon which Articles they Swear them to enquire and to return their Verdict, Presentment or Detection, upon those things enquired and found, against a certain time then to be appointed. But the Articles used in these cases are wont to be drawn by way of Interrogatories, (viz. whether any Person within their Parish hath committed Adultery, &c. or is suspected of such Crimes. And for the other Crimes, which belong to the Ecclesiastical Cognizance. After the Church-wardens are Sworn to enquire severally upon their Conscience, and to search out as much as in them lyes, who and what Persons have committed the aforesaid Crimes, or are suspected as such; they are wont to meet in the Parish Church, or other secret place and confer together touching the Premises, and draw into Writing particularly, those things to be presented and the Names and Surnames of the Delinquents on that manner. To such an Article we present such an one to

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an Adulterer, &c. or that he is commonly and publicly noted and suspected of such a Crime. Which Presentment, by vertue of their aforesaid Oath, they are to exhibit before the Visitor, on the day appointed: Which if they do not, they are to be Excommunicate, by vertue of the aforesaid Monition, to exhibit their Presentment on such a day, and are not to be absolved, until they appear and exhibit their Presentment. And it is to be noted, that (although it is very usual now adays,) it is not sufficient to present such an one, to have committed, or be suspected of Adultery: But the Party with whom they committed the same is also to be named, and that there is a publick Fame concerning the same: Or otherways, from such a general and incertain Presentment, Canonical Purgation cannot be enjoined, and if it be enjoined, the Party detected cannot purge himself, by reason of the uncertainty and generality of the Detection.

3. The Persons presented are to be cited to appear upon some comperent day, to be assigned by the Judge, to answer Articles, touching their Souls health, and especially certain crimes presented in the Ecclesiastical Visitation, lately celebrated. This Citation being duely executed and returned, the Judge must signifie to the Party convened, by word of mouth, the words of the Presentment, or the effect of them on this manner: We object unto you, that you are Lawfully detected and presented before us, (by the Inquisitors and Church-wardens of your Parish,) to have committed such a Crime, (here specifie the Crime presented) and that there is a publick Fame and Rumor that you have committed this Crime presented: And though the Party convened, is not bound to answer, whether he hath committed the Crime objected or not, (because it is a Criminal Posi^{tion},) yet he ought to answer; negatively or affirmatively, as to the Fame objected; and though he denies both the Crime and the Fame, yet Canonical Purgation may be enjoined. Therefore the Judge is wont to Interrogate the Defendant, if he can alledge any Cause, why a Canonical Purgation may not be enjoined him, and why a Competent day may not be assigned and appointed, (consideration being had, to the

† *Lind. de
purgat. cap.
Clerici. verb.
solemnitate.*

distance of the Defendant's Habitation, from the place of Judgment,) on which to purge himself, under four, six or eight hands of some honest Men of the Parish, according to the quality of the Person, the weightiness of the Crime presented, and the Infamy; and is also wont to decree all and singular † (who either will, or can oppose and object against this Purgation, and the Compurgators to be introduced) to be cited, by publick Edi&ct, or a Citation publicly denounced in the Parish Church of the Defendant, to appear at the day and place assigned for this Purgation, to propound and object in due form of Law, (if they think themselves interested) against the Purgation and the Compurgators to be produced. And it is to be noted, that it hath been always practised and adjudged, that a Purgation may be enjoined upon the sole Presentment made by the Church-wardens and the Inquisitors, no Witnesses being produced to prove the publick Fame, (notwithstanding the Defendant doth deny upon his Oath, both the Crime and the Fame) because the Church wardens and Inquisitors, Sworn in manner aforesaid, are said to be *Testes Synodales*.

4. In the aforesaid publick Edi&ct, these things following are to be specified (*viz.*) that such an one, who was detected of such a Crime, is to purge himself on such a day, in such a place, with such a number of honest Parishioners, his Compurgators. This Edi&ct is to be denounced by the Minister of the Parish-Church of the Defendant, in the same Church in time of Divine Service, six days at least, before the day on which the Purgation is to be made, so as in all probability, those who have a mind to oppose this Purgation, may have knowledge of it, before the day appointed for the same. But this Citatory Edi&ct is to be Certified, either personally upon the Oath of the Party publishing and executing the same, or by his Authentick Certificate.

5. The said publick Edi&ct being returned with a Certificate, in manner and form as aforesaid, the Defendant is to be called publickly; if he appears, the Judge must ask him if he has his number of Compurgators ready in Court, according to the Assignment; and if he says he has them

ready,

ready, then the Judge must cause Proclamation to be made three times, by the Cryer of the Court, for all and singular Persons Cited, in manner and form aforesaid, to propound and object, (if they have ought to object against this Purgation, to hinder it, or against the Compurgators, to be produced in that behalf. But if none come to oppose, then they are to be pronounced Contumacious, and in Penalty of their Contempt, the Judge must decree and proceed to Purgation, and all manner of Opposers whatever are to be silenced for the future, as to the Premises. Then the Party presented must produce his Compurgators † and may desire the Register to write down their Names and Surnames in the Acts, and must offer himself ready and prepared to take his Oath, as to his Innocency in the Crime objected, and must desire that his Compurgators may be admitted and received, and that Right and Justice may be done and administered to him. Then (seeing the Judge is not excluded from proposing Objections, though none else object) if nothing can be propounded or objected by the Judge, against the Compurgators, or if it appears to the Judge, that they are Parishioners of the Parish where the Party detected lives, and honest Men; he must publicly recite, as well to the Party presented, as to the Compurgators, the danger of Perjury, and the Penalty (as well by the Divine as the Human Law,) due to those who commit Perjury, and who do falsely invoke the Name of God: And he must often and seriously admonish them to have a care of their Souls, and he must also read them the Presentment made by the Church-wardens, or he may command it to be read by the Register. And if after all this, the Party detected doth insist upon his former Petition, (that is, that he is ready to take the aforesaid Oath, and doth desire that his Compurgators may be admitted and received,) the Judge ought to administer to the Party, this following Oath: (viz.) that he hath not committed the Crime objected, and that he is not guilty of this Crime. Which Oath, if the said Party doth take with a bold and resolute Mind, then the Compurgators, are to be asked, whether or no they will, and can with a safe Conscience Swear, that they believe

† Lind. de
purg. canon. e.
Caterum verb.
Purgation. &
verb. compell-
lant per tot.
gloss. Jo. Anan.
de Accus. c. cum
oporteat, versic.
secundo quarti.

† *Lind. ubi*
s. verb. compell-
ant in fine
gloss.

believe the Party detected is innocent of the Crime, whereof he is detected, or that he hath taken a true Oath: Which Oath, if it is boldly and undoubtedly taken by the Compurgators, the Judge must Pronounce, that the Party detected hath Lawfully † and Canonically Purged himself, and is innocent of the Crime objected, and therefore must restore him to his former State, Credit and Reputation, and so dismiss him from his Office, as to those things objected.

6. If upon the return of the aforesaid Publick Edict, the Opposers do appear, they are to be admitted to propound any manner of concluding Matter against the Admission of the Purgation; (*viz.*) that the Party detected hath committed the Crime objected, (specifying the Party with whom the Crime was committed, and the time and place of Commission of it:) Or that the Compurgators aforesaid, ought not to be received or admitted, in as much as they are the Parents, Kinsfolk or Tenants of the Party producing them, or very poor and needy (for a poor Man is not to be admitted, if the Parish is spacious and if there be a multitude of Parishioners, but it is otherwise, if it be little, and not populous) and such who may be easily corrupted and suborned of evil Fame, and a stained Reputation, and Criminous (specifying their Crimes) for those who object against a Purgator, may propound any Crimes, and that he is noted for the like Crime, for which the Defendant is presented; and lastly such as ought not to be admitted to the Purgation of any Person. If the Parties propounding the aforesaid Objections, do undertake to prove the same, they are to be admitted; and if they prove the Crime objected, Sentence is to be pronounced, that they have proved their Intention mentioned in their Objections, and the Defendant is to be pronounced as Convict, and Canonical Penance is to be enjoined as before. But if only the things objected against the Compurgators are proved, the Party convened is to be pronounced to have made default in his Purgation, and Penance is to be enjoined as above, with a Condemnation of Charges in both cases, that is, if either the Crime is proved, or the Objections against the Compurgators

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In this last case, the Judge may, out of favour, grant the Party convened, a new day, on which to make his Purgation by other Compurgators: And then if he doth Lawfully prove himself guiltless, he is to be dismissed from the Office of the Judge, and is to be pronounced to have Lawfully purged himself, and is to be restored to his former Fame, but the Cause which may induce the Judge, to grant this second Purgation, may be this, (*Scil.*) where the Objections proved against the Compurgators, who were first rejected, were unknown to the Party producing them. But two things are to be noted: First, That an Intimation of this second Purgation, is to be denounced and published, and the Objections are to be admitted against the same, as upon the first Purgation. Secondly, Though the Defendant being admitted to this second Purgation, doth Lawfully Purge himself, yet he is not to be admitted, until he pay the Charges expended by the first Opposers. For if the first Opposers had failed in proving their Objections, they might have been condemned in Charges, due to the Defendant.

7. If any is accused (though judicially) upon any Crime, by a voluntary Promoter, if the Promoter doth not prove the truth of the Crime objected, or at least that there is a publick Fame, arising from vehement Causes and Presumptions, so as that a Canonical Purgation is, or ought to be enjoined to the Party accused; the said Party accused, may sue the Party accusing, in a Cause of Defamation; and the said Accuser, is not less, but more to be punished (that is, a more grievous and publick Penance is to be assigned him) than if he had uttered Defamatory words, Face to Face, by word of Mouth. Likewise if the Church-wardens or Inquisitors, do present any one, for any notorious Crime, to be corrected by the Ecclesiastical Judge, or upon a publick Fame; and the Party presented doth Lawfully purge himself, as well of the Crime, as the Fame, and proves that the Fame though presented, did arise from malevolent and infamous Persons, and sometimes from the sole and nude Accusation of some naughty Woman, and the Judge by reason of this Proof, doth dismiss this Party thus presented, from his Office,

Office, no Purgation being enjoined: The aforesaid Party presented, may in this case, sue those who presented him, in a Cause of Defamation, as above. Therefore let all beware for the future, how they accuse or present any body for any Crime or publick Fame, unless they prove that Fame, to have had its Original from very just Causes and vehement Presumptions. Therefore although a rumor or report of any Crime, hath been aspersed or gone abroad amongst many grave and honest Men; yet if this report took its original from Enemies to the Party detected, or from some infamous Woman's nude Accusation, the Parties accusing or presenting cannot be said to have just Cause for their Presentment or Accusation, and therefore they are liable to an Action as before. But if they make a special and particular Presentment or Detection, according to the truth of the thing (that is, that such a Fame, or rather Rumour is dispersed abroad, by such Persons, or by the Accusation or Confession of a Woman with Child, or in Child-bed,) and not a general Presentment, as is wont to be made; in this case, the Party presented, if he doth Institute his Action, in a Cause of Defamation, he shall be Cast, if it be replied and proved, that the Fame or Rumor was noised and reported abroad, as is contained in the Presentment.

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C H A P. IV.

*The Order and Manner of Confirming a BISHOP.
And what things are to be done by the Proctor, at
the time of his Confirmation.*

S E C T. 1.

First, a day and place being assigned for this Confirmation, before the Worshipful N. the Commissary, &c. The Letters of Commission, and the King's Patent, under the Great Seal of *England*, must be presented and publickly read before him. Which being so read, the said Commissary must take upon him, the Execution of the said Letters Commissional, &c. and decree that it may be proceeded, according to the Force, Form and Effect of the same.

S E C T. 2.

Then the Proctor of the Dean and Chapter must appear, who must exhibit his Proxy for the said Dean and Chapter, and make his part for the same, and present to the said Commissary, the Reverend Father W. the Lord Bishop, elect, and set him before him.

S E C T. 3.

Then the said Proctor of the Chapter U. must exhibit the Citatory Mandate, taken forth against all Opposers, &c. with a Certificate upon the Execution of it, and must desire that those Parties so Cited, may be called. Then Proclamation must be made three times, for all the Parties Cited, &c. who being so called, and none appearing, the Proctor of the Chapter must accuse their Contumacy, and desire that they may be reputed Contumacious, and

and that in Penalty of this their Contempt, the way and means of opposing this Election, may be denied them and every of them: And also he must desire that the said Commissary may proceed in the said business of Confirmation, according as the Law requires, the absence or Contempt of the said Parties (so Cited, and not appearing,) in any thing notwithstanding, as is contained in a Schedule, which the said Commissary must read.

S E C T. 4.

THese things thus done, the Proctor of the Chapter must give his Summary Petition in Writing, which the said Commissary at his Petition, must admit, so far as by Law it is to be admitted; and must decree that it shall be proceeded Summarily, *& de plano*, and must assign the Proctor to prove his Petition immediately.

S E C T. 5.

THen the said Proctor of the Chapter, in supply of the Proof of the Contents in the said Summary Petition, must exhibit the Instrument or Letters Testimonial, upon the Process of Election, made in Authentick form, and Sealed with the Dean and Chapters Common Seal; also the Letters Patent, shewing the King's Assent to this Election, and the Instrument upon the consent of the said Lord Elect, so far as they make for the intention of the said Dean and Chapter, *&c.* and the said Commissary, must (at the Petition of the Chapter's Proctor) assign an immediate Term, on which to hear his Sentence or final Decree.

S E C T.

S E C T. 6.

WHich things being thus dispatched, Proclamation being made three times, for all Persons Cited, &c. and none appearing, the said Proctor of the Chapter, must accuse their Contumacy again, and in Penalty of this their Contempt, he must desire the said Commissary to decree, that it may be proceeded to the pronouncing of Sentence, or the final Decree, the Absence or Contempt of those Persons Cited, in any thing notwithstanding; as is contained in a Schedule, which the said Commissary must then read. Then the Bishop Elected, must take the Oath of Supremacy, and the other usual Oaths.

S E C T. 7.

After all this, the said Commissary must read the Definitive Sentence, pronouncing, declaring and doing all other things as is contained in the same.

S E C T. 8.

Then the Commissary, (at the Petition of the Proctor, of the Chapter, and the Petition of the Bishop Elected,) must decree Letters Testimonials to be made upon the Premises, &c.

F I N I S.

A B R I E F
DISCOURSE,
Shewing the
ORDER and STRUCTURE
O F A
Libel or Declaration.

† *Parat. ff. T.
de edendo.*

Nihil dictum, quod non prius, is a Maxim, as true as 'tis general. So that to enlarge or say any thing in this Discourse, more than what others, (of great Learning and Practice,) have said before is a thing I aim not at; neither would I have any so far mistaken in me, as think me guilty of so much Vain-glory and Ostentation. Neither were it possible for me, (or any else, as I think) to reduce this Discourse, to a better Method than *Wesembeck* † has done, whose words I shall insert, with some Additions out of other Authors, which will render this Discourse so compleat, as that the meanest Capacity (our insipid Proctors, I mean of) may form a Libel, without inspecting their precedent Books; which they can no more be without, than a Cripple without his Crutches. I question not but the Learned Advocates are so well stored with Discourses of this nature, that this can be of little use to them.

1. What a Libel is.
2. How many and what, are the parts of a Libel.
3. How many sorts of Libels.
4. What things are said to be proper to a Libel.

5. What

5. What is the efficient Cause of a Libel.
6. The matter of a Libel.
7. The form of a Libel; deduced also from a Syllogistical Argument.
8. The next, and not the remote matter, ought to be expressed in a Libel.
9. The end of a Libel.

A Libel is said to be a Diminutive, a *Libro* from a Book; whence formerly a Paper was offered: In general it signifies every Writing: Figuratively the matter is put for the thing contained in it. But properly in this Argument, a Libel is taken for the Writing which contains the Action: * Or a Libel is nothing else, but a fit conception of words, setting forth a Specimen of the future Sute. † According to *Lanfranc. (c quoniam. de Petition. n. 7.)* it is defined the Lawyers Argument.

* *Alciat. in prax. fol. 18. Speculator. de Libell. conf. Sect. 1.*

† *Ummius disp. 6. lib. 8. n. 38.*

2. It is said to consist of three parts. (*Scil.*) 1. The major Proposition; which shews a just Cause of the Petition. 2. The Narration, or the minor Proposition. Whereby is inferred (in the species of the Fact propounded) that there is cause just for the Petition. 3. The conclusion or the conclusive Petition, which conjoins both the Propositions, and includes the minor in the major. A Libel therefore is a practical and judicial Syllogism, as it were. Though *Speculator de Libelli confessione. Sect. 1.* *Libellus, n. 3.* recites its parts somewhat otherways; in the first place, he puts the cause of the Libel, which is the major Proposition: In the second place, the Obligation, which is the minor Proposition; and in the third place, the Action, which is the Conclusion: For the Petition it self, is said to be the Action: The Conclusion concludes in the Petition, and not in the Words related. And this is the chief part of the Libel, which ought especially to be regarded in Civil Actions; not so in Criminal Actions or Causes, because in them there needs no Conclusion. In this the * Plaintiff concludes, justly desiring from the Premises, and the things propounded, that the Defendant

† *Alciat. ubi supra Jason. Zasius & alii in prin. Inst. de Action.*

* *Alciat. ubi supra.*

sendant may be condemned, both in the Principal and in the Charges. †

† Speculator ubi supr. Sect.

species. glos. in

d. c. 1. Lanfr.

c. quoniam. adnal

verb. petition.

de prob. n. 1.

Alciat. in

prax. fol. 103.

Ummius

disp. 6. th. 8.

Roshach. prof.

tit. 33.

† Oldendor. p.

de forma Lib.

* Ferrar. in

forma Lib.

contr. opp.

lib. &c.

Each Plaintiff and Defendant's Name,
And eke the Judge who tryes the same;
The thing demanded, and the right whereby
You urge to have it granted instantly:
He doth a Libel right and well compose,
Who forms the same, omitting none of those.

* Ita formari
debet ut ex
narratis suffi-
ciat jus agendi
simpliciter resul-
tans in postea
explicite in pro-
bationibus de-
clarari. We-
semb. ubi s.
h. 8. Anchor
cosil. 148. n. 6.
† Lanfr. c.
quoniam. de
prob. ad verb.
petition. n. 8.

But the particular form of a Libel, * consists in the con-
clusion, which (what it ought to be) *Jason in Sect. huic*
autem n. 13. Institut. de Action. copiously disputes; so al-
so *Myns. in Inst. de Action.* At this day, such respect is
had to the conclusion, that it be sufficient to gather from
its form, of what nature the Action is, though no name
be expressed: Which seems to have been otherways for-
merly, at least by the Law of the *Codices*. To make this
form the more dilucid and clear, we will dispose it into
an Argument or a Syllogism, † *in Darii*, which shall in
short comprehend the whole Matter, and all the Parts of
a Libel.

Every one who Defames an honest Man, ought to be
Ecclesiastically punished.

A. G. hath Defamed a certain honest Man, J. G.

Therefore the said A. G. ought to be Ecclesiastically
punished.

8. Civil Actions are either singular, general or univer-
sal, as was shewn in the Practice. Those Actions which
are singular, are also either real, personal, or mixt, as has
been shewn. Now in a real Action, the next Cause, and
not the remote, ought to be expressed, * as for example, * *Lanfr. ubi s.*
demand ten pound of *Titius* which I lent him, and I *n. 3. Myns.*
desire he may be condemned to pay me that Sum: Here *Inst. de Act. in*
now the Contract, or the lending Mony, is the next *Rub. n. 15. §*
Cause in a real Action, and it is the remote Cause in a *Sect. omnium*
personal Action; for the Obligation or Bond arising from *autem. n.*
the Contract, is the next or nearest Cause in a personal *14. 15.*
Action, and the remote Cause in a real Action: Where-
fore in a real Action, if you say in your Libel, I ask
ten pound of *Titius*, which he owes me upon Bond; here

† *Lanf. ubi*
supra. n. 3, 4,
5, 6.

your Libel is so general, as it is in danger of being voided, if the Defendant excepts against it: But if in this Action, you say on this manner, I ask ten pound of *Titius* which I sent him, the Libel is dilucid, by your making mention of the next Cause: And so observe the quite contrary in a personal Action. † But in a general or universal Judgment or Action, there is no need of mentioning any Cause.

9. The end of the Libel is, That it may propound the Plaintiff's desire, and instruct the Judge and the Adversary, as to the nature of the future Sute, and to be the foundation of Judgment: For both the Articles of the Proofs are to be accommodated to the form of the Libel, and the Sentence is to be pronounced according to the same. Wherefore to the intent that the Judgment be begun in due order, and be founded upon a certain thing, it is necessary that a Libel be given by the Plaintiff, though not admonished thereto: The Omission whereof doth vitiate the proceedings. Whence a Libel is deservedly ranked amongst the substantial Acts of the proceedings: For no Libel existing, the proceedings are rendered null, &c.

10. Agreeable to what has been said, I will here obviate the form of a Libel, as it is offered before the Judge of the Ecclesiastical Courts. And in the first place, it must be drawn in the Name and Style of the Judge, as *Alciatus* has also observed in his form, set down in his Practice, at fol. 18. (*viz.*)

In the Name of God Amen. *Before you the Worshipful H. W. Doctor of Laws, Principal Official of the Beautiful Consistory Court of York, &c. The Party of J. G. against A. G. &c. alledgeth and complaineth, and propoundeth, &c.*

Major Pro-
position.

Imprimis, He doth Propound and Article, That the said J. G. was and is a Man very honest, just and upright, of good fame, life and honest conversation, aspersed, defamed, with no Crime (at least such as is notorious) except what is afterward mentioned, and is commonly reputed, had, named and esteemed as such, &c. *Item,*

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Item, That notwithstanding the Premises, the said A. G. Minor Pro-
out of a malign Spirit, in the Months of A. M. I. &c. *position.*
in this present Year, 1630. in one or other of the said
Months, within the Parish * of D. aforesaid, or some * *Ratio hujus*
other place within the said Parish, maliciously and out of *apud Myns.*
an intent of Defaming and Injuring the said J. G. hath *Inst. de Action.*
defamed and injured him, and hath said, uttered, &c. *Señ. Malef. &*
some Reproachful and Defamatory words, of and against *Señ. curare*
the said J. G. and especially these words following, or *autem.*
the like in effect, (*viz.*) the said J. G. said and reported
(though falsely,) diverse and sundry times, or at least once,
speaking to the said J. G. thou hast got a Wench with
Child, &c. The Party doth Propound and Article, as to
such a time and manner of speaking the words, &c.

Wherefore Proof being made upon the Premises, the Party of the said J. G. doth Request or Petition, that the
said A. G. for such excessive rashness in the Premises, *The conclu-*
and concerning the same, may be corrected and punished *sion.*
according to your pleasure; and also that he may be con-
demned in Charges, made and to be made in this Cause,
on the behalf of the said J. G. &c. *Mynsinger in Inst.*
de injuriis Señ. in summa concludes thus. Wherefore
the Plaintiff desires that (in order to repair his Fame
and good Name,) the Defendant afore named, may be
compelled by you, and your Definitive Sentence, to dis-
own, confess and declare publickly, that the said Defama-
tory and Injurious words, were inadvisedly and against
the truth, spoke and uttered by him, &c.] or otherways,
that Right and Justice may be administred, &c.

Ecclesiastical Jurisdiction.

Matters Testamentary.

**For a Legacy.*

A Lying sick upon his Bed made his Will, and afterwards said to his Executors named in the Will, I will that B. shall have *20 £ more, if you can spare it. The Executors answered yes; but no Codicil was made of it. A Bill was preferred in the Spiritual Court for the Legacy, the Executors pray a Prohibition: *Cur.* although this Court hath not Power to hold Plea for the thing Libelled for there; yet it hath Power to limit the Jurisdiction, of other Courts, and if they abuse their Authority, to grant a Prohibition: But it not being annexed to the Will by a Codicil, it was but *fidei Commissum*, and it was doubted if the Spiritual Court might hold Plea of it, for if they cannot hold Plea of it, then a Prohibition may be granted. *Godb. 246. Carwrights Rep.*

†*Will that concerns Lands and Goods, Prohibition not to prove the Testament as to the Goods. The Tryal at Law of the Testator's Sanity.*

The Marquess of *Winchester* made his last Will, and gave many Mannors and Lands to his reputed Sons, and made them Executors, and bequeathed divers Legacies of Plate, Sums of Money, &c. The present Marquess framed a Suggestion that the Testator was *non compos Mentis*, and to have a Prohibition out of B.R. generally to stay all the Proceedings in the Ecclesiastical Court, (for the Will was about to be proved) as well for the Legacies as the Lands, and the ground of the motion was that the † Will concerns Lands and Goods; and if the Ecclesiastical Courts proceed concerning the Testament of the Goods, this would prevent and prejudice the Tryal at Law in B.R. for if he was of sane Memory at the making the Testament of the Goods, he could not be of *non sane* Memory at the time of making the Will of the Land, both being at one and the same Instance and the Common Law shall determine what is *sane* Memory.

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Memory in this Case, and the Prohibition was general. *Ca. 6 Rep. 23.*

* If any Orphan of London sue in the Ecclesiastical Court for any Goods, Money, and Chattels due to him by the Custom of London, or by Devise or a Legacy by the Will of his Ancestor, or to have account; a Prohibition shall be granted, for the Lord Mayor and Aldermen have the Jurisdiction in such Case. * Prohibition lies if Orphan sue for Legacy in the Ecclesiastical Court.

† So if a Lord of a Mannor has Probate of Testaments within his Mannor; if any such Will be proved in the Ecclesiastical Court, a Prohibition Lyes. † So where the Lord of a Mannor hath Probate of Wills

SHOTTER *vers.* FREIND.

THE Spiritual Court would not admit the Evidence of one Witness, only to prove the Payment of a Legacy. It was argued for a * Prohibition, and that a Consultation ought not to be granted. 1. One Witness is good at Common-Law. Wherever the Spiritual Court does contradict the Rules of the Common Law, a Prohibition lies. At Common-Law for Debt, &c. one Witness is sufficient; so Deeds and Leases may be controverted in the Spiritual Court, and shall they always require two Witnesses? So the Reason why a *Modus* *Decimandi* is prohibited, is not because the Spiritual Court will not allow a *Modus*, for they will allow a *Modus*: But the true Reason is, because their † Proof of it is not the same as ours, for they will allow of forty Years for a Prescription, which the Common Law will not, but only time immemorial. *Ridly. 153.* The Authorities in the Books are very plentiful, as *3 Cro. 88. 655. Mo. 907. 3 Cro. 66. Mo. 418.* are in point *Hob. 247. Tel. 92.* * The Court will not grant a Prohibition upon a bare surmise, *Rols. rep. 439. 2. Rols. abr. 300. 302. 27 Car. 2. Richardson and Desborough in B. R. 12 Rep. 66.* seems to be against me, but the Reason there given for it is a very weak one, (*viz.*) because the Spiritual Court * Prohibition to the Spiritual Court for refusing the Evidence of one Witness only to the payment of a Legacy. † A Plaintiff goes to the Spiritual Court in a *Modus*. † The Proof of a Prescription in the Spiritual Court. * The Court not to grant a Prohibition upon a bare surmise.

*Where a prohibition lies after Sentence.

hath Cognizance of the Matter, for if this were a Reason, it would take away all Prohibitions; but though they have Cognizance, yet if they proceed against the Rules of the Common Law, a Prohibition well lies. Another Objection was, that a Sentence is past? I answer, though it be so, yet a * Prohibition lies; for immediately upon the Refusal of the Proof, the Sentence was given.

St. B. Shower è contra. 1. Because a Sentence is past, and a Prohibition ought to be brought before the Matter be determined. 2. This is purely Testamentary, and being originally within their Cognizance, all Incidents belonging also to them are so too, as the Payment of Legacies, and Proceedings on it; and though they proceed against the Rules of the Law, yet if they have Cognizance of the Cause no Prohibition lies, but they may proceed according to their own Law, so is *Rols. 2. Abr. 298. Hob. 12.* If a Legacy be given on Condition not to Marry without Consent, this Condition to hinder Marriage, is not good in the Spiritual Court; but though it be good in our Law, yet no Prohibition lies, for the Spiritual Courts have their Jurisdiction settled by Law, so *Yel. 92. 12 Rep. 65. 2 Inst. 608.* are express for us.

If a Prohibition may be granted in our Case, it may as well be granted in any Case, where they differ in their Proceedings from the Common Law, which would destroy all their Jurisdiction. 1 *Keb. 939. 2 Keb. 222. 1 Sid. 51.*

Ch. Just. The Prohibition may be good, notwithstanding it issues after Sentence; for immediately upon refusal of the Witness Sentence was given, so that the Prohibition could not be brought before.

As to the Merits of the Cause, I confess there are a great many Cases that justify the granting of a Prohibition; and therefore its hard to contradict so many Authorities; yet all the Judges 3. *Jac.* declared that no Prohibition lay in such Case, and in 2 *Inst. 608.* for since they have Cognizance of the Principal Matter, it seems *prima facie*, that they should have Cognizance of the thing depending

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pending on it. The Case of *Plene Administravit* differs from this; for if an Executor be sued in the Spiritual Court for a Legacy, and he Pleads fully Administred by one Witness only, and they refuse to admit this *Proof, * Proof of a Prohibition certainly lyes, and it seems unreasonable they should deny the Proof of one Witness, for so there might be a failure of Justice; for there is no Remedy on an Appeal to the Delegates, since they proceed also according to the Rules of the Civil Law; and truly I believe this was the Reason of granting so many Prohibitions in this Case; for it would be a suppression of Justice, were every poor Man bound to prove the Payment of a Legacy by two Witnesses, who pays perhaps only in the presence of one Man, thinking that to be sufficient, and certainly I think one good Witness ought to Influence any Judge.

* Proof of
fully Admini-
stred by one
Witness only.

Eyres. Just. Our Law does in many Cases require two Witnesses, and why shall we prohibit them, because they proceed according to the Course of their own Law?

So to prove a Will, they may certainly refuse one Witness, and why not in this Case of the Payment of a Legacy? † To prove a Will they may refuse one Witness, and why.

Dolbin Just. There the Will is the Principal Matter, immediately under their Cognizance alone, but here the Payment is Collateral and so it differs; its very reasonable the Prohibition should be granted, and if it should be otherwise, it would be a Snare to the People. *Adjournatur.*

Of Reparation of Churches. *Woodward vers. Makepeace. 1. W. and M. B. R. vide infra.*

THE Question was, whether the Parish may be forced to repair the Bells of a Church, for which they were sued in the Spiritual Court, and it was now moved for a Prohibition by * *Tremaine Serjeant*, who argued that a Parish is not bound to repair Bells, they being

* Parishioners
may be forced
to repair the
Bells.

being only Ornaments, and fixed to the Freehold. 3 Cro. 659. Poph. 197. 2 Rols 291. And in Syderfin's Rep. there is a Case, that if a Bell fall upon a Man it is not forfeited because it is fixt to the Freehold.

Ch. I. Holt. A Man is an Inhabitant where his Land lies, *quoad* a Tax, and he is reckoned in Law an Inhabitant of that Diocese in which his Land lies, *vid. Stat. of Westm.* The same Law charges a Man to repair the Ornaments of the Church, as it does the Body of the Church. Bells are only Chattels.

Dolbin. The Steeple is no Ornament, no more are the Bells, but Convenient things to call People together and therefore its very reasonable they should be repaired.

Eyres. Latch. 203. 1 *Bulst.* 20. The Land is Taxable as well for the Ornaments of the Church, as of the Church it self. Bells are as requisite as the Church. *Rols.* 2 Rep. 222. is but an Opinion.

Note, This Case was argued in the time of *Jac.* 2 and adjudged then that the Bells are no part of the Church but only Ornament, and therefore a Prohibition was granted, but the Court here seemed of another Opinion.

In *Jefferie's Case.* 5. Rep. 66. He was Taxed toward the Reparation of the Church, &c. the Parishioner Assessed it upon his Lands in another Parish of *H.* where he occupied, and held in his own manurance, and not where he was inhabiting.

It was resolved,

1. That the Court *Christian* had cognizance *de reparatione Corporis sive navis Ecclesie.*

2. Though the House where *Jefferies* lived were another Parish, yet inasmuch as he had Lands in the Parish, where he was Taxed in his own Occupation he is in Law a Parishioner of *H.* *For the Place where he Lies, Sleeps, Eats, do not only make him a Parishioner but also for as much as he manured Land in *H.* and thereby is resident upon it, this makes him a Parishioner also in *H.* for this purpose.

* What makes a Man an Inhabitant or a Parishioner Subject to Taxes for Reparations.

2 If the Re Person venience Village, the sam this Caf the Land for the n his bring a Confu

T W clai ther, and D. had uf Parish of Cur. A Portion o meely as Prescripti Godb. 45. The Vic Tithes, an Vicar sued paid them denied it, Controvert Vicar, and Common L Vicar of P

2 If in this Case *Jefferies* should not be charged to the Repairs of the Church of *H.* for these Lands, no Person shall be charged then; whereupon great Inconvenience would ensue, for one who Inhabits in the next Village, may Occupy the greater part of the Lands in the same Village, and so the Churches go to ruin. In this Case the Charge is upon the Person, and not upon the Land, but upon the Person in respect of the Land, for the more equality and indifference; and upon *Jefferies* his bringing a Prohibition on the Suggestion aforesaid, a Consultation was awarded.

TITHES.

TWO Parsons of two several Parishes, and one claimed certain Tithes within the Parish of the other, and said, that he and all his Predecessors Parsons of *D.* had used to have the *Tithes of such Lands within the Parish of *S.* and that was pleaded in the Spiritual Court. *Cur.* A Prohibition was granted; for he claims only a Portion of Tithes, and that by Prescription, and not merely as Parson, but by a collateral Cause; viz. by Prescription, which is a Temporal Cause and Thing, *Godb. 45. 2 Rols 282. pl. 2. accordant.*

The Vicar of *P.* sued one in the Spiritual Court for Tithes, and he pleaded that some of them, for which the Vicar sued, did belong to the Parson, and that he had paid them to the Parson, and prayed a Prohibition. *Cur.* denied it, for by this Plea he hath put in Debate the Controversie of the Tithes † betwixt the Parson and the Vicar, and then when both are Spiritual Persons, the Common Law shall not hold Plea of them, *Godb. 50. The Vicar of Pancras's Case, 2 Rols. abr. 311. Mesm. Case.*

* Prohibition
because a Custom
is unreasonable.

A Vicar Libelled in the Spiritual Court for Tithes Lambs, and laid that there was a Custom there, that all Lambs Ingendred, Fallen and Bred upon any one Tenement or Living in the said Parish, although they belonged to several Owners, they have been cast and reckoned together, as if they were but one Man's, and the Tenth Lamb of them so counted together, have been paid for Tithes. A *Prohibition was granted, for that the Custom is unreasonable and against Law; for by this means it might so fall out, that some one might have but one Lamb, and that might be taken for Tithe, and he that had more, should pay nothing at all, *Hob. 329. Barkevers. Cocker.*

Hill. 9 W. 3. B. R.

IT was moved that a Quaker who was brought up by *Habeas Corpus* might be discharged, it being returned that he was Convicted for not paying his Tithes according to the Statute of 23 H. 8. The Council said, the Late Act of Parliament did intend to take off the Jurisdiction of the Ecclesiastical Court, and to give another Remedy, and where there is a Remedy at Common Law that in the Ecclesiastical Court ceaseth, *Lit. in his Charter of Frankmoign*, where there is a Remedy at Law, you grant a Prohibition; so in 5 Rep. the Case of the Orphans of London: So in *Jones 320.* when Tithes cease to be a Lay-Inheritance, the Authority of the Ecclesiastical Court ceased. 2 *Brown 14.* 2 *Inst. 649.* 2 *Rols. ab 305.*

† Where the Spiritual Courts, and the Temporal Courts have concurrent Jurisdiction.

Ch. Just. The Late Act only gives another Remedy for Tithes; it is a kind of Additional Remedy; that in the Matter, the † Ecclesiastical Courts and the Temporal Courts have concurrent Jurisdiction; as in the Case of a Pension by Prescription, though my Lord Coke's Opinion on the Statute of *Circumspecte agatis* be, that a Writ of Annuity

Annuitiy lies, and consequently a Prohibition if the *Pen-^{* Pension by Prescription.} sion be sued for in the Spiritual Court, yet it is not so, for no Prohibition lyes in such Case.

But there was a fatal Exception to the Return, for its said that the Suit in the Spiritual Court, was for Tithes, or some other Ecclesiastical Duty, which *per Cur.* is ill, for it is † uncertain for what sort of Duty he was com-^{† Uncertain Return.} mitted.

Ch. Just. We ought to know what this Ecclesiastical Duty is; for the Cause of the Commitment ought to be shewed, perhaps it was for not paying Oblations, perhaps for a thing for which he was not suable there. Let him be discharged.

De Ter. St. Mich. B. R. 9W. 3. Of granting Administration and Proving Wills.

A *Mandamus* was granted last Term to the Judge of the Spiritual Court, to grant *Administration to^{*Mandamus to grant Administration not to go, till the Contest about a Will is determined.} I. S. who as he suggested was next of Kin to the Intestate, and now it was moved by *Northey* for a *Superedeas* to it, for that the Fact was, that I. S. being cited refused to come in; upon which another of the Kindred sued for Administration, but was opposed in it, by one who pretended there was a Will, &c. which Matter was now under Controversie before the Judge there; and therefore till that was determined, the Spiritual Judge could not obey the *Mandamus*.

E contra. You commonly my Lord, grant such a *Mandamus* to the Judges of the Spiritual Court, upon suggestion that I. S. died Intestate, and that I. S. is next of Kin, and if it be false, they may take issue upon it, and so they may do in this Case.

Ch. II.

C. Inst. Is there no difference between a Controversie and no Controversie? When there is no Controversie we do so, but here is a Controversie, and we wont grant *Mandamus* till it be determined; for suppose the Will should prove good, what then will the granting Administration signifie?

Hudson vers. Fisher. 2 W. and M. B. R.

* Prohibition to hinder the Probate of a Will, though Lands are concerned, and why.

IT was moved for a Prohibition to hinder the Probate of a Will, there being *Lands concerned, the Suggestion was that the Devisor was *non Compos*; but the Court would not grant it, for unless the Will be proved, the Executors cannot Sue nor Pay Debts. 6 Rep. 23. b. *vide post. & vide supra.*

Of Spiritual-Court Power to Set Rates towards the Repair of a Church. Hawkins vers. Lyon. 9 W. 3 B. R. vide supra.

The Suit in the Spiritual Court was for not Repairing a Church.

IT was moved for a Prohibition, and that an Issue at Law might be directed, Whether there was a Rate or no Rate by the Majority of the Parish; which was accordingly directed, and found for the Plaintiff,

And now it was moved for a Consultation, for that the Ecclesiastical Court has Cognizance of this Matter. 2 Roll. abr. 289, 290. N. 40.

No Prohibition though the Party be unequally Rated

But though the Party be unequally Rated, yet *Prohibition will be granted, *Rel. 112. Starkey vers. Gorn.*

The Temporal Court hath nothing to do to meddle with a Tax laid for Reparation of a Church, for its meerey Spiritual, and to be determined in the Court Christian, So Poph. 197.

And by Northey. *The Bishop can only send out his Pro-
cesses, and compel the Parishioners by Ecclesiastical Cen-
sures, to meet and make a Rate; but he cannot inter-
pose in the making of it; if he does a Prohibition lies,
Rols. Rep. 262, 270.

* If the Bishop
interpose in the
making a
Rate, a Pro-
hibition lies.

Ch. Just. Unless there be a special Custom, the Parishio-
ners are bound to Repair the Church, and the Parson
the Chancel, of Common Right; and if you ground
your Libel upon a Custom, you must bring your self
within that Custom.

Note, in a Case 6 W. 3. It was said by the Ch. Just.

that if a *Fence of a Church-Yard be out of Repair,
the Parishioners may be Sued in the Spiritual Court to
repair it; but if the Fence lies on another Man's Ground,
he is Bound to Repair; but if it encloses the Church-
yard, then not.

† Fence of a
Church-yard.

The Ecclesiastical Jurisdiction as to Seats in the Church.
Cokers, vers. Sampson, and all Church-wardens.

LIBEL in the Spiritual Court at Excestor. for a
Seat, which the Church-wardens assigned to one M.
whose Right the Plaintiff declaimed, the Defendant
there (who now prayed the Prohibition,) prescribed by a
Estate for their Seat, as ancient and belonging to
their Tenement in to, and that they and all those, &c.
were used to Repair. It was doubted, whether this
prescription in *Navi Ecclesia* be good: But in an Isle,
were good; the Court inclined, that such a Prescrip-
tion in *Navi Ecclesia*, may be for special Cause; but
in this Case they would not grant a Prohibition.

* Prescription
to Repair a
Seat in *navi*
Ecclesia.

And

Jacob and Dallew. 7. W. 3.

Council.

S Hewed Cause why a Prohibition ought not to go to the Ecclesiastical Court, where the Libel was for a Seat in the Church.

I take it that the Placing and Displacing of People in the Seats of the Church, belongs purely to the Ordinary, unless there be a Prescription by one who hath Freehold. 1 *Rols abr.* 288. *Hob.* 69. 2 *Bulstr.* May and Gilbert, Where Prohibitions were denied, Then some Prescriptions are also tryable in the Ecclesiastical Court as *Modus Decimands*, and repairing of Churches.

* What Prescriptions are tryable in the Ecclesiastical Court.

Northey. Where a Man shews a fixed Interest. he may have an Action on the Case, which may be tryed at Common Law; for how can they in the Spiritual Court award Damages, here is a direct Prescription which they deny.

Curia. Take a Declaration and set forth a Suggestion

Defendant surmiserh, that he and his Ancestors have used time out of Mind, &c. to have an Isle with a Seat in the Church, for himself and his Family; this was a Libel for a Seat. *Curia.* Because it appeared on the Examination of the Party himself, that the Parish have used to Repair the Isle and Seat, the Court would not grant a Prohibition; for that proves his Ancestors were not Founders of the said Isle and Seat. *Godb.* 144. 87. 12. *Rep. Garren and Pym.*

† No Prohibition, if the Parish have used to Repair the Isle and Seat.

DEFAMATION.

D R. Wells sued Hye in the Ecclesiastical Court for Defamation, for saying to him that he Lied. Plaintiff prays a Prohibition, but denied. A Man said to a Clerical Spiritual Person, thou art a Woodcock and a Fool; which Words he was sued in the Spiritual Court; a Prohibition was awarded.

* Where a Prohibition shall be awarded or not, on Suit for Scandal in the Spiritual Court.

A Suit was in the Spiritual Court for these Words, thou art a base and paltry Rogue, a Prohibition was awarded. Note, by the Statute of *Articuli Cleri*, though the Words be general, yet they do not tend to all Defamations; and where the Suit is for defamation, there the Cause ought to be expressed, and ought to be wholly Spiritual, Reg. 49. 29 Ed. 3. and 7 Rep. in *Kenn's Case*.

It was objected in *Ann Davis's Case*, 4 Rep. Action at Law for saying she had a Bastard, or was got with Child by &c. that the Defamation of Incontinence concerns the Spiritual, and not the Temporal Jurisdiction; and as the Offence shall be punished in Court Christian, so the Remedy for such Defamation shall be there also; so if a Man be called Bastard, or Heretick, or Miscreant, or Advowterer, in as much as these belong to the Ecclesiastical Jurisdiction, * no Action lies at Common Law: * No Action

But it was answered and resolved, *per Cur.* that if a Woman has a Bastard, she is punishable by the Stat. 8. El. c. 1. And although Fornication or Advowtry, is not examinable in our Law, because of the Indecency of an open Examination; yet it was resolved if the Defendant had charged the Plaintiff with bare Incontinence, that the Action is maintainable at Law, for the ground of the Action is Temporal, viz. loss of Marriage. So if a Divine is to be presented to a Benefice, and one to defeat him of it, saith to his Patron, that he is an Heretick or a Bastard, or that he is Excommunicated, by which the Patron refused to present him (as he well may if it be true,) that he shall have his Action at Common Law. *lies at Common Law, for Defamation, merely Spiritual.*

In *Palmer vers. Thorp*, 4 Rep. 20. It is resolved that * Defamations determinable in the Ecclesiastical Court, ought to have 3 Incidents. ** Defamations determinable in the Spiritual Court ought to have three Incidents.*

1. That it concern Matters merely Spiritual, and determinable in the Ecclesiastical Court, as for calling a Man Heretick, Schismatick, Advowterer, Fornicator.
2. It ought to concern Matters merely Spiritual only, and if such Defamation touch or concern any thing determinable at Common Law, the Ecclesiastical Judge shall not have cognisance of it.

3. The Person Defamed may not Sue there for Amend^s or Damages.

Jurisdiction of the Admiralty.

Term St. Hillary. 8 W. 3. Spencer vers. Garrett.

A Prohibition was prayed to the Admiralty.

HERE were several Partners to a Ship, only one refused to have her go to Sea, and caused the Ship to be arrested by Process out of the Admiralty Court, and would also compel the other owners to enter into a Recognizance, to answer the Share of the Ship if it be lost: But its no Reason the rest should suffer for the Obstinacy of one Man, and then he has a proper Remedy at Law.

* One Tenant in Common, not to have Action on the Case against another

Ch. Just. No, he has no Remedy at Law; for one *Tenant in Common cannot have an Action on the Case against another. And this is the Practice in the Admiralty, and seems to be reasonable enough; but however put in your Suggestion, and take a Prohibition, unless Cause, &c.

† For Seamen's Wages.

Note, Counsel moved for a Prohibition to the Court of Admiralty, where the Libel was for †Seamen's Wages, the Contract being upon the Land.

Ch. Just. Holt. No, No.

The King vers. Brown. Ter. Trin. 9 W. 3.

ONE *Brown* takes a Prize at Sea, and then converts the Ship to his own Use at Land; and upon this there is a Condemnation in the Court of Admiralty

miralty at the King's Suit. The Question was, whether the Admiralty shall have Cognizance of this or not.

Note, High-water Mark is as far as it overflows by ordinary Tides; and Lands to the Low-water Mark, are the Subjects, and not certainly in the Admirals Jurisdiction.

Tresilian vers. Jones. Tr. 20 Car. 2. B. R.

A Prohibition was prayed to the Admiralty, because a Commission issued to enquire of a *Ship Split on the Sands and Rocks in the Coast of Cornwall; there being a proper Writ at Common Law. *Sed non alloc.* because this is but a Commission to be enformed, and the Admiralty hath Jurisdiction of Floats; and this is not said to be a Wreck.

* May award a Commission to enquire of a Ship Split.

The King vers. Fox. Hill. 20, 21 Car. 2. B. R.

A Habeas Corpus was prayed to deliver Fox, being imprisoned by Warrant of the Vice-Admiralty in Suffolk, until he deliver Goods, said in the Warrant to be Wreck. Whereas by Statute 3 Ed. 1. c. 4. † Wreck † Admiralty is exempt from their Jurisdiction, and here the Property is claimed by the Lord of the Mannor, which the Court is granted, and that the Admiral shew Cause why a Prohibition should not be granted.

† Admiralty hath no Jurisdiction of Wreck.

Habeas Corpus issued out of the King's-Bench, to have the Body of one S. committed to the Marshalsea by Sir Thomas Crompton Judge of the Admiralty; and upon the Return, the Cause appeared to be for aiding and abetting E. who was indicted of Piracy to escape out of Prison, and assisting him with Ropes and other Engines, to break Prison and Escape. *Per tot. Cur.* altho' all the Fact committed by I. S. be upon the Land, and within the Body

* *The Fact.* of the County; yet because it depends upon the *Pyracy viz. assisting a Pyrate to escape, depends on the Pyrracy; therefore determinable by the Admiralty. committed by E. with which the Temporal Judges have nothing to do, but it is delegated by Parliament to the Admiral, to try in Nature of a Felony, for this Cause they remanded the Prisoner; for he is as an accessory to the first Pyrracy, and that is determinable by the Admiralty. As if Sentence be given in the Court of Admiralty, for a Marine Cause; the Execution of this Sentence, either by

† *Execution of the Body and Goods out of the Court of Admiralty.*

the † Body or the Goods of the Party condemned, extends throughout the whole Realm to the Court of Admiralty, because it depends on the Principal and first Sentence. *Yel. 134, 145. Scaddings Case.* So was the Case of *Quickly vers. Sturt. pach. 7. W. 3. B. R.*

* *Bail for a Ship arrested, the Bail may be sued in the Admiralty.*

And by *Holt. Ch. Just.* If a Ship is arrested in the Admiralty and they take *Bail there, and sue there on the Bail, no Prohibition lies, because they have Cognizance of the Principal, and may take Bail in the Suit; so they may Sue there for a Stipulation, made on a Suit depending there; but it was objected that they have no Power to take a Recognizance. *4 Inst. 135.*

But by the *Ch. Just.* That of my Lord *Cooke* hath been over-ruled ever since I knew this Court.

Pach. 1 W. and M.

A Master of a Ship being at *Rotterdam*, was in great Necessity of Provisions and Money, and having no Credit, he borrows so much Money on the Body of the Ship, and binds the Ship to payment. The Lender of the Money Sues in the Admiralty, upon which the Plaintiff Sued forth a Prohibition out of this Court. It was argued by Mr. *Goodwin*, that this ought to be tryed at Common Law, the Matter of Fact in this Case being done on the Land, the surmising that it was done at Sea, will not give the Admiralty a Jurisdiction; but upon Suggestion that it was done upon Land, a Prohibition may be granted. *3 Bulst. 205. Noy. 67.* If the Contract were at Large, it is left at Common Law to be tryed. *Latch 11. 2 Sid. 331, 452.*

E Contra.

E Contra. 'Tis admitted that the Ship was in great want, and that he had no other way to save himself and the Mariners, but by this, *Hypothecation of the Ship. * A Ship Indeed 'tis objected by Mr. Goodwin, that the Master of the Ship, might have sent Letters to the owners of the Ship, and so have been supplied; but here while the Letter is sending, the Men are Starving. Certainly in Case of Extremity, the Master may Hypothecate the Ship; for the Master hath a sort of Qualified Property in the Ship, and is intrusted with the Care of the Ship, and makes Charter-parties beyond Sea, and if the Ship miscarry, he must answer for it. Pawnd by the Master in great want of Provisions.

Its very plain in *Bridgmans Case*, in *Hob.* that the Master may Hypothecate the Ship, but indeed he cannot sell it. *Latch. 252. Scarborough's Case.* If then the Master may Pawn the Ship, there must be some Remedy to recover the Money borrowed, and this cannot be any where but in the Admiralty; for it cannot be at Common Law; for by the strict Rules of the Common Law, the Ship being not his own, he could not Pawn it, and in the Admiralty there are many things allowed, which the Common Law will not allow. So in the Admiralty a *hundred Mariners may joyn in a Suit for Wages, but at Common Law they cannot. † Master may Pawn, not Sell the Ship

Hill. Ter. 34 & 35. Car. 2. Heathcock vers. Worden. is exactly such a Case as this is, and there the Court would not grant a Prohibition. * A Hundred Mariners joyn in the Admiralty for Wages.

Curia. There is no doubt but the Master of a Ship in case of Necessity may Pawn the Ship, and the Owners themselves receive a Benefit by it; for else the Men must Starve, and be Lost: But its true the Master cannot Sell it.

In this Case the Common Law does not give any Remedy: therefore they shall not be hindred to try it in the Admiralty, for the Master cannot have any other Remedy at the Common Law, having no Property in the Ship, it being the owners; and therefore he cannot Pawn it, wherefore a Consultation was granted *per Cur.*

Hill. 8 W. 3.

* For Seamen's Wages.

IT was moved for a Prohibition to the Court of Admiralty, where the Libel was *for Seamen's Wages, the Contract being upon Land, but rejected by the Court; so was the Case of the King against Pyke. A Prohibition was prayed to the Admiralty in a Suit by the Master and Mariners for Wages, which the Court denied, albeit the Mariners were retained by the Master, unless it be by Charter-party of Affraightment, nor hath it ever been granted. Tr. 23 Car. 2. B. R.

A promise was made at *Plymouth*, to deliver Goods in a Bill of Lading, mentioned to be made at *Barbadoes*, in as good Condition as he received them; and on Suit in the Admiralty, a Prohibition was prayed, which was opposed by *North*, because the Plaintiff hath Election to proceed in the Admiralty on the Damage of the Goods whether on the Sea, or beyond Sea, or he may Sue at the Common Law on the Promise; which difference was agreed by all the Court. But the †Libel appeared to be for non-performance of the Agreement, therefore a Prohibition was granted. 2 Keb. 498. *Caule vers. Cooke*.

† Libel for non-performance of an Agreement, a Prohibition lies.

* Suit for Goods sold at Land, good in the Admiralty.

On Depredation at Sea, the Suit is good in the Admiralty, though the *Goods are Sold at Land. 3 Cr. 1685. but 1 Rols. 530. *Sir Richard Bingley's Case contra*.

What Things the Admiralty cannot hold Plea of.

† Not of things done on a Foreign Land.

* Agreement at Sea, put in Writing at Land under Seal.

THEY cannot hold Plea of † Things done on Foreign Land. The Case was, *Palmer* Libelled in the Admiralty for an Agreement made at Sea, for not well Transporting of Sugars, against *Pope*, and that the Agreement was put in Writing at *Barbary*, and that the Sugars were spoiled at Sea, and hereupon a Prohibition was granted; but if the *Writing had not been at Land under Seal, but a simple remembrance of the Agreement, it had been otherwise. Also one *Fennings* Libelled in the Admiralty

Admiralty made Straights And the Island not regulated which Fol. 21 yet it v which Point.

If a sued in which mon L

The at Land the State the High done, therefore for the should sued in fine Ca

If a any Port of it.

They beyond

A Li Thames tion, su Comitar 2. B. R.

Admiralty against *Audley*, upon a Contract laid to be made *Apud Malaga inter districtum Maris vocat'* the Straights of *Gibraltar*, *infra Jurisdictionem Maritimam*. And because it appeared that the Contract was made at the Island of *Malaga*, a Prohibition was granted; for it was not regarded that he added *infra Jurisdictionem maritimam*, which appears contrary. *Hob. 79. Palmer vers. Pope. & Fol. 212*: though the original Contract were made at Sea, yet it was changed when it was put into Writing sealed, which being at Land, changed the Jurisdiction as to that Point.

If an *Obligation be made at Sea; yet it cannot be *Obligation
sued in the Admiralty Court, because it is an Obligation, *made at Sea,*
which takes his Course, and binds according to the Com- *not to be sued*
mon Law. *in the Admi-*
rality.

The Admiralty Court hath no Power over any Cause at Land; for both by the Nature of the Court, and by the Statute, it is only to meddle with things arising upon the High Seas; and further, that these things at the Sea done, must be also of the same nature and respect; and therefore, if a Man should make an Obligation at Sea, for the security of a Debt growing before at Land, or should make a Promise to pay the same; this cannot be sued in the Admiralty Court, because it is not for a Marine Cause, *Hob. 11. Bridgman's Case.*

If a Plea of any Contract arise for † Things done in † Things done
any Port or Haven, the Admiral cannot hold Jurisdiction *in any Port or*
of it. *Haven.*

They cannot hold Plea for *Money lent to the Master *Money lent
beyond Sea, if it be borrowed for victualling the Ship. *to the Master*
beyond Sea.

A Libel was against a Ship for † Tackle bought on the † Tackle bought
Thames, of an Intestate; Counsel moved for a Prohibi- *on the Thames,*
tion, supposing it in the Suggestion, to be *infra Corpus* *27 Car.*
Comitatus, and the Court granted a Prohibition. *2. B. R. Merryweather vers. Mounford.*

*Cases as to Appeals before the Delegates.
Storke vers. Cullen.*

* Commission of
Delegates, by
the Lord War-
den of the
Cinque Ports
void.

Condition of a Bond was, that I. S. shall abide the Judgment of the Admiralty, of the *Cinque Ports*. Defendant pleads an Appeal to the Delegates five Weeks after the Sentence, that the Ship was prize. Plaintiff demurs. *Barwell* Serjeant, the Defendant is Surety for B. on bailing of the Ship arrested, and both bound, &c. which is discharged by the Sentence on Appeal, and whether the * Lord Warden of the *Cinque Ports* may receive Appeals, was the Question; for it was objected, that the Commission ought to be under the great Seal in *Chancery*, and not as here by the Constable of *Dover*, Lieutenant of the *Cinque Ports*: But by 4 *Inst.* 340. an Appeal doth lie, and the Lord Warden as an Admiral, may receive Appeals; and though the final End, and last Appeal be to the King, upon the Statute 8 *Eliz. c. 5.* yet not immediately to the King in *Chancery*, but to the Admiralty. *Cur.* Though an Appeal may be to the Lord Warden himself; yet the Lord Warden cannot make Delegacy by Commission, *Trin.* 28 *Car. 2. B.R.* Condition to perform the Order, is not suspended by the Appeal.

Note; Depositions in *Chancery*, or before the Delegates in the Spiritual Court, &c. cannot be given in Evidence if the Party be alive, unless by consent on both sides.

A Prohibition was prayed to the Commissioners of the Delegates, on the Death of the Appellant, which not only abates the Writ, but it determines their Commission, which *Twisden vers. Moreton* agreed; but *Hale and Rainsford Contra*, that if they proceed it may be Error. But their Commission is not determined more than on Writ of Error. 2. *Keb.* 768. *Polixsen's Case*.

I desire the Learned, candidly to accept and censure these my Endeavours, and pardon and amend what is amiss; which I shall own as a reward sufficient. If any thing is well done I give God the Glory; if ill, I willingly undergo the Shame

τῷ θεῷ μόνον Δόξα.

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FEES taken and accounted due in the COURTS
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For every Tuition or Curation,	6.	0.
For the Election of a Curator, made by one above 14 and		
under 21 Years of Age,	1.	0.
For founding the Prerogative Jurisdiction,		

To the Register.

For every Probate of a Will and every Administration,	3.	6.
For Registering the Will, and every Bond entred,	2.	0.
For Respite of an Inventory,	1.	0.
For every Tuition or Curation,	4.	8.
For the Election of a Curate made as above,	1.	0.
For the Tuition Bond,	1.	0.
For Ingrossing Wills and Inventories, they take according		
to the length.		
For Commissions, whether to prove Wills, or grant Admi-		
strations, &c. they take for Judge and Register toge-		
ther, as the whole Fee of it,	8.	4.
If any of the aforesaid things are done by Rural Deans,		
there is due to the Rural Dean besides those,	6.	8.
For Copias of Wills and Inventories to the Register, by this		
Table of Fees now spoke, there is only allowed,	2.	6.
For Copies of Bonds there is only to the Register,	1.	6.
For every Search also in the said Courts the Register has,		
	1.	0.
For founding the Prerogative Jurisdiction when a Will is		
proved or Administration granted, upon bona notabilia,		
	1.	0.
		instead

Instead of the aforesaid FEES they take at this Day,

To the Judge for an Administration where the Estate is above 40 l. or upwards. 7 s. od.

Which advance from 2 s. 10 d. was (as I have heard) in compassion to one of the Commissaries (of the late Archbishops) his necessitous Condition agreed by all the Professors and other Officers to be imposed upon the Country.

The Registers now receive for each Probate and Administration, 5. 6.

For Copies of Wills and Inventories, the Registers now receive to themselves and their Deputies, besides their Scribes Fees, 4. 6.

For Copies of Bonds they receive, 3. 6.

For a special Act, as they tell you, you must pay. 1. 0.

The Reason of this Augmentation to the Registers is, because they pay great Fines to the Arch-bishops for their Places; and do again let them for term of Years to Deputies, for great Fines: Which Deputies have no way to raise their Moneys, but by this manner of advance or exaction upon the Country.

If an Administration (where the Estate is above 40 l.) is granted by a Rural Dean; he makes the Parties pay (besides his own Fee and the Fees of 7 s. and 5 s. and 6 d. to the Judge and Register) for a special Commission 8 s. 4 d. so that the whole Charge to the very Court will be at least 1 l. 0 s. 10 d.

There are many other Fees, for Copies of Acts, Depositions of Witnesses, and several things in toto contradictorio which might indeed be added; as also Fees to the Appraisors, &c. but these are most remarkable and obvious to the Vulgar; being so frequently enquired after. Which are delivered without the least design of injuring any but rather of doing right to all; and with intent to manure all those hideous Exclamations of Oppression these Courts are daily accused of) by removing the Cause of such Out-cries.

F I N I S.

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J. Walthoe in the Middle-Temple Cloysters.

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